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No. 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

ROBERT SHELTON,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court is reported at 148 F. Supp. 926. The opinion of the Court of Appeals is reported at 280 F. 2d 701. The opinions appear at R. 214 and 232.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 18, 1960 (R. 244). The petition for certiorari was filed on July

18, 1960 and granted on March 27, 1961 (R. 245). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

Petitioner, a copy editor on the New York Times, refused to answer certain questions at a hearing of the Internal Security Subcommittee of the Senate Judiciary Committee, for which refusal he was convicted of contempt under 2 U.S.C. §192, fined, and sentenced to six months imprisonment. The questions presented in this case are:

1. May a newspaperman subpoenaed by the Internal Security Subcommittee without probable cause or reason to believe that he has been affiliated with, or has any information about, Communists or Communism, be convicted of contempt for failing to answer questions on that subject, notwithstanding the guarantees of the Fourth, Fifth and First Amendments?

2. Was there a delimited "question under inquiry" before the Subcommittee at the time of petitioner's appearance sufficient to meet constitutional due process and statutory requirements?

3. Is an indictment which fails to set forth the "question under inquiry" sufficient under the Sixth Amendment to charge the offense of contempt under 2 U.S.C. §192?

4. Is a defendant entitled to a dismissal of an indictment or a preliminary hearing thereon when he alleges by motion and affidavit that less than twelve jurors on the grand jury which indicted him were able to exercise an independent judgment by reason of the fear engendered by operation of the government employees security programs, a fear which amounted to actual bias and prejudice against him?

Statutes Involved

2 U.S.C. § 192, R.S. 102 (52 Stat. 942), as amended, provides:

> "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, wilfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

Senate Resolution 366, 81st Congress, 2d Session, provides:

> "Whereas the Congress from time to time has enacted laws designed to protect the internal security of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and
>
> "Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and
>
> "Whereas agents and dupes of the world Communist conspiracy have been and are engaged in activities (including the origination and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper

or prevent effective administration and enforcement thereof; and

"Whereas it is vital to the internal security of the United States that the Congress maintain a continuous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws.

"Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possession, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

The First Amendment to the Constitution of the United States provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The Fifth Amendment to the Constitution of the United States provides that no person shall "be deprived of life, liberty, or property, without due process of law."

Statement

A. *Background of Subcommittee Hearing*

In June of 1955 in the course of hearings on "Strategy and Tactics of World Communism", Winston Burdett, a radio commentator, testified before the Internal Security Subcommittee of the Senate Judiciary Committee (R. 71). Burdett revealed that he had been a Communist Party member in the late 1930s and early 1940s while employed by the Brooklyn Eagle, and had engaged in Communist activities at home and abroad. He named a number of persons as former fellow Communists on the Brooklyn Eagle and in the Newspaper Guild; those he named were then called and questioned by the Committee.[1]

Later in 1955, a new series of hearings was instituted involving New York newspapers, particularly the New York Times. In December, 1955, thirty-eight witnesses

[1] See Parts 14, 15 & 16, Hearings before the Senate Internal Security Subcommittee, "Strategy and Tactics of World Communism", 84th Cong., 1st Sess.

(30 of them from the New York Times) were questioned in an executive session in New York City (R. 145-47). On January 4, 1956, the Subcommittee commenced a public hearing[2] which, although described by its Chairman as a *"subsequent chapter to the Burdett testimony"* (R. 71), was principally an investigation into Communism on the New York Times or among its employees; of the eighteen witnesses called in the hearing, fifteen were persons employed, formerly employed or otherwise connected with the New York Times (R. 148-49).

It has never been clarified just how and by whom the New York Times hearing was initiated. The Subcommittee had never met to authorize the hearing, although Rule 1 of the Subcommittee's Rules states "No major investigation shall be initiated without approval of a majority of the subcommittee" (R. 140). At the opening of the January, 1956 hearing, Senator Hennings, a Subcommittee member, disclosed that there had been no prior Subcommittee authorization, stating (R. 72): "I would like to have the position of the committee, if it be the position of the majority of this committee, since the committee has not met to determine whether one policy or another is to be pursued in the course of these hearings," and that "we have no list of prospective witnesses, nor has any offer of proof as to what their testimony is likely to be been given to this subcommittee . . ." (R. 76).

Nor has it ever been clarified how the Times witnesses actually came before the Subcommittee; indeed, it is unclear whether the witnesses had actually been subpoenaed by the Subcommittee or by Counsel Sourwine. The Times

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[2] Petitioners *Shelton*, *Whitman* (No. 10) and *Price* (No. 12) were witnesses called at the hearing. Another witness indicted for refusing to answer questions therein, was acquitted on the ground that the Subcommittee's inquiry lacked the specificity required by this Court's *Watkins* ruling. See *United States* v. *Peck*, 154 F. Supp. 603 (D.C.D.C. 1957).

itself asserted that it was Sourwine who called the tune on the witnesses (R. 104):

> "When more than fifty subpoenas were issued to people in the press, radio and other fields of communication on behalf of the committee last November, Mr. Sourwine was the only person who seemed to know anything about them. They were issued under the name of Senator Eastland, but when this reporter [James Reston] called the Senator about them, he said he did not know they had been issued, did not know the hearings had been called, and said he would have to call Mr. Sourwine to find out the facts."

Sourwine, when confronted with the Times' assertion, was unable to explain just how the subpoenas came to be issued (R. 104-105). He was even vaguer, as we shall see, when asked to explain how petitioner in particular came to be called before the Subcommittee.

B. *Petitioner's Subcommittee Appearances*

On November 14, 1955, a Subcommittee aide arrived at the New York Times with approximately thirty subpoenas for Times employees (R. 121). While none of the subpoenas was addressed to petitioner, one of them was made out to a "Willard Shelton", a nationally known columnist. On discovering that Willard Shelton was not employed by the Times, the Subcommittee aide made inquiry at the Times and was informed that there were "several" Sheltons working at the Times, including petitioner, Robert Shelton, employed on the "news side" (R. 119-24; 127-29). The information that there was no Willard Shelton on the Times but that there were several Sheltons there, including one on the news side, was communicated to Chairman Eastland through Counsel Sourwine. After some discussion Chair-

man Eastland told Counsel Sourwine, according to the testimony of the latter (R. 105-06), "Well, go ahead and tell him to come." Thereupon, on instructions from Sourwine, the Subcommittee employee, having written in the words "or Robert Shelton" on the subpoena, served it on petitioner (R. 106, 121). A new subpoena in petitioner's name alone was subsequently issued on November 23, 1955, and served on petitioner.

On December 7, 1955, petitioner appeared pursuant to the subpoena at an executive session of the Subcommittee in New York. He inquired why he had been called, and was told that the Subcommittee was "clearing up a question of identity" (R. 52). Interrogated on a number of subjects, he answered some of the Subcommittee's questions, but then refused to answer others (see R. 50-64). When petitioner first indicated that he would refuse to answer certain of the Subcommittee's questions relating to possible Communist associations or activities, Counsel Sourwine said (R. 56-57):

> "I will state, Mr. Chairman, *I am greatly surprised.* I did not expect this. We came into this as I explained to the Senators and to put on the record to clear up a question of identity. The record will show that the witness was not charged with being a Communist. Counsel said you are not a Communist and you never have been; isn't that right?
>
> "Mr. Fraenkel. Obviously that involves——
>
> "Mr. Sourwine. The question does, of course, involve the answer, but I must admit to the chairman, *I am taken by surprise.*
>
> "It may be that we shall have to question this witness more at length later." (Emphasis supplied)

Together with other Times employees, petitioner was recalled under the subpoena at the January 1956 public hearing of the Subcommittee (R. 66, 96). Prior to being sworn, petitioner made unavailing objection to the jurisdiction of the Subcommittee and asserted that: "I fail to see why I am involved in this hearing which the chairman said on Wednesday stems from the Burdett testimony. There was no reference to me in the Burdett testimony . . ." (R. 84). Subsequently petitioner stated in his renewed challenge to "the jurisdiction of the committee" (R. 87):

> "I am involved in these hearings as a victim of accident. The subpoena first served to me was originally made out in the name of a person who does not work on my paper. A committee aide, when told that there was no such person on the Times, insisted on knowing if there was anyone with a similar name employed there. There were a few, but the only one that interested your man was the sole similar name in the news department—mine. At the executive hearings the committee counsel tried without success to link me with a certain New York newspaper. He was unable to establish any connection because I never worked for the paper under discussion. Yet I have been called back here today" (R. 89).

Notwithstanding his objections and without explanation, on the insistence of Counsel Sourwine petitioner was sworn and interrogated (R. 84). He answered a number of questions, but refused to answer certain questions inquiring into possible Communist associations, and conversations with other persons (R. 85-96), on the grounds that the questioning was beyond the Subcommittee's jurisdiction and violated his First Amendment rights (R. 87-91).

C. *The Proceedings Below*

Following a Senate contempt citation, on November 26, 1956, petitioner was indicted on three counts under 2 U.S.C. § 192. He was charged with refusal to answer the following three questions at the January 1956 Subcommittee hearing (R. 1-2): (1) "Are you, sir, a member of the Communist Party, U.S.A.?"; (2) "Did you ever have any conversation with Matilda Landsman?"; and (3) "What did you tell them (your employers)?"

The trial, which resulted in conviction on the first two counts, commenced in the District Court on January 14, 1957. The two principal issues at the trial concerned (a) the presence or absence of probable cause for the Subcommittee's calling and interrogating petitioner, and (b) whether a "question under inquiry" before the Subcommittee had been sufficiently delimited at the time of petitioner's interrogation to meet constitutional and statutory requirements. We consider, in order, the facts as they emerged at the trial on these two issues:

1. *The Issue of Probable Cause*

At the commencement of petitioner's trial, in explaining a pre-trial defense subpoena for all information which the Subcommittee had about petitioner at the time it called and questioned him, petitioner's counsel stated that the major factual issue at trial would concern "probable cause" for the Subcommittee's calling and questioning of petitioner (R. 35-36, 43). Petitioner's counsel asserted that the Subcommittee's own records would prove that, at the time the Subcommittee called petitioner, it "had no information whatever about him", and that petitioner had been called "without any evidence that this was a man who had been in any way concerned with the communist movement or knew anything about it . . . he was called before

the committee, without any prima facie case or probable cause" (R. 35-36). Prosecuting attorney Hitz thereupon joined issue by asserting that no probable cause is required for a Congressional committee to subpoena anyone at all to inquire into his possible Communist affiliations. *Mr. Hitz flatly affirmed that "a man off the street could be called off the street and asked, 'Are you one of the persons that we have a duty to protect this country from?'"* (R. 40). Additionally, Mr. Hitz announced that he would not rely solely upon the proposition that no probable cause is required to subpoena a witness before a Congressional committee and inquire into his possible Communist associations; he offered to demonstrate that the Subcommittee actually possessed information when it called petitioner that he had relevant evidence on the subject of its inquiry (R. 40-42). Accordingly, the prosecution sought to demonstrate "probable cause" for the calling and questioning of petitioner, through the testimony of Counsel Sourwine.

Although Sourwine had stated in the 1955 executive hearing (R. 56) that *"the record will show that the witness [petitioner] was not charged with being a Communist"* and had asserted his surprise at petitioner's refusal to answer questions concerning Communism, at the trial Sourwine reversed himself and testified that petitioner *had been charged with being a Communist prior to the 1955 hearing.* At the trial Sourwine purported to recall information supposedly received by the Subcommittee before its 1955 hearing linking a Shelton on the Times with a Communist group on the Times (R. 48-49). According to witness Sourwine's recollection, some months before petitioner was called, a letter (signed by a pseudonym) was received from a "reliable" informant, stating that a "Shelton" on the news side of the New York Times "was a

member of a Communist group on the Times", who "would be or should be in a position to give the committee information about the activities of that group" (R. 98). Sourwine was unable to explain why he was previously "surprised" at petitioner's actions if the Subcommittee had a letter from a "reliable" informant saying what Sourwine testified it said (R. 112). Sourwine was likewise unable to explain how or why the name "Willard Shelton" had been put on the Subcommittee subpoena, if the Subcommittee had a letter concerning "a Shelton" on the Times, since Willard Shelton had never had any connection with the Times; Sourwine only volunteered his surmise of the "process" by which the subpoena had been issued (R. 102-103):

> "Somebody in the typing section at some point, having the name Shelton and not having the first name, asked somebody else, 'What is this fellow Shelton's first name?' Somebody else said, 'What, what Shelton?' He said, 'The newspaperman Shelton.' And somebody who knew that there was a newspaperman named Willard Shelton said, 'Willard'. Now that is wholly a guess."

Despite the fact that petitioner had made clear that probable cause was to be the major factual issue at the trial, Sourwine disclosed on cross-examination that he actually had not seen the alleged anonymous letter for over a year before the trial (R. 184), nor had he bothered to examine it while preparing his testimony (R. 98). Cross-examination also revealed that the identity of the supposed "reliable" informant was unknown to Sourwine and even to the Subcommittee members (R. 100-101); Sourwine purported to have identified as a "reliable" informant the author of the letter concerning "a Shelton",

because of resemblance to other letters from the same informant in its "typing" and its "tone" (R. 102). Under persistent cross-examination Sourwine next affirmed that the purported letter contained the names of some 15 to 18 other persons "identified" by the anonymous informant (R. 172 et seq.); however, the *only* one of the 15 to 18 listed names Sourwine could recall was "Shelton" (R. 185-88, 189-90, 196). Finally, Sourwine asserted that there had been a whole series of letters from the anonymous informant, but when pressed further as to the content of the supposed "Shelton" letter, whose "typing" and "tone" he had earlier recalled, Sourwine now testified, *"I have no actual independent memory of this particular letter as a sheet of paper and what was on it"* (R. 186).[3]

At all stages of the trial the Government vehemently opposed repeated defense requests to produce the supposed anonymous letter about which Sourwine gave this remarkable testimony. Even prior to the trial, petitioner had subpoenaed Committee records to prove that there was absolutely *no* information concerning petitioner in the Subcommittee files and that it had called him arbitrarily and without probable cause. The Government vigorously opposed the subpoena and it was quashed by the Court at the outset of the trial (R. 25-39). After the testimony by Sourwine about the supposed letter, petitioner moved repeatedly for the production of that letter (R. 99, 117, 169, 181) to prove that Sourwine's improbable and contradictory testimony as to its content

[3] The Court will note, of course, that the only things Sourwine could "recall" about the alleged letter were those which would help rationalize the issuance of the subpoena to Willard Shelton. Thus, for example, he could remember that the informant gave the name of Shelton with no first name and that the Shelton was a newspaperman, i.e., on the news side of the Times. This precise recollection is all the more remarkable when contrasted with the failure to remember a single additional name out of the 15 or 18 others supposedly mentioned in the letter.

was false, that no such letter ever existed (R. 143, 194), and that the Government's "probable cause" contention was a fabrication. Sourwine, however, asserted that he would not produce the anonymous letter because it was "*confidential*" (R. 118, 212).

The Trial Judge was thus put in a difficult position, for he was aware (see R. 30-33) that in a criminal case he could not permit the Government to rely for its proof of "probable cause" on a confidential document withheld from the defense and thus insulated from refutation.[4] The Court first sought to avoid the necessity of ordering production of the "letter" by a preliminary ruling that probable cause to call petitioner to the 1956 hearing was provided not by any letter, but by petitioner's refusal in the earlier 1955 executive session to answer certain of the Subcommittee's questions (R. 181-83). Thereupon petitioner submitted a memorandum to the trial court (see R. 213) pointing out that the decisions of this Court prevent the fruits of an illegal search or seizure from being relied upon as prob-

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[4] See, e.g., *United States* v. *Coplon*, 185 F. 2d 629, cert. denied, 342 U.S. 920. It is also clear that on a challenge to the existence of probable cause, the so-called "informant's privilege" is inapplicable. *Roviaro* v. *United States*, 353 U.S. 53, 60-61; *Cochran* v. *United States*, 291 F. 2d 633. See also *Hill* v. *State*, 151 Miss. 518, 118 So. 539 (1928), and *Smith* v. *State*, 169 Tenn. 633, 90 S.W. 2d 523 (1936). As the California Supreme Court recently emphasized (*Priestly* v. *Superior Court*, 50 Cal. 2d 812, 818, 330 P. 2d 39, 43 (1958)):

> "Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue."

The dilemma created by the Government's attempt to rely upon what it refused to divulge, was conceded by prosecuting attorney Hitz (R. 212):

> ". . . there is a technical problem arising within the confines of this courtroom . . . It has to do with the right of the defendant, as he asserts it, to further examine the witness Sourwine upon a document that we say procedurally, and as a matter of comity with another branch of the Government, and for reasons of national security, we preferred not to produce in court."

able cause for a subsequent search or seizure (*Nardone* v. *United States*, 308 U.S. 338; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385)—that if there had been no probable cause to call and question petitioner at the 1955 hearing, his refusal there on constitutional grounds to answer certain questions could not constitute "probable cause" for calling and questioning him at the 1956 hearing.

The Trial Judge was apparently persuaded by this view, for in rendering his opinion, he avoided relying for probable cause either upon the "anonymous letter" withheld at trial, or upon petitioner's failure to answer certain questions at the 1955 executive session. Instead, essentially accepting the prosecutor's "man off the street" theory, the District Court ruled that probable cause for the exercise of a Congressional committee's subpoena power over a witness *is not an issue cognizable by the courts in his subsequent contempt prosecution for refusal to answer* (R. 222-223):

> "There is a complete want of precedent, we believe, for the proposition defendant urges, which in simplest terms would limit the powers of a duly authorized committee of the Congress in conducting an inquiry for a legitimate legislative purpose by permitting such committee, and hence Congress itself, to compel the attendance and testimony of only such witnesses as the courts might judicially determine were reasonably expected to be in possession of pertinent information.
>
> "The doctrine of separation of powers and a rightful regard for the authority of the legislative branch of the Government, we believe, refutes a judicial evaluation of those matters which clearly are within the discretion of the Congress, which alone is responsible for the exercise of the authority from which the disputed power arises."

The District Court thus answered petitioner's constitutional objection by flatly holding that probable cause is not required to call and question a citizen before a Congressional committee and to punish him for contempt if he refuses to answer. As an afterthought, the opinion then weakly suggested that probable cause to question petitioner might nevertheless be found in a consideration nowhere suggested by the Subcommittee, by witness Sourwine or the prosecution—the Subcommittee's information of "communist infiltration into . . . elements of the New York newspapers, including the one by which defendant was employed" (R. 223).

The Court of Appeals opinion leaves unclear whether it shared the view of the District Court that the Fourth Amendment is inapplicable to Congressional subpoena power. Rather than deciding this question, the court below found "probable cause" for petitioner's interrogation in the Subcommittee's information that *some* members of the "working press" were (or had once been) Communists (R. 243-244):

> "After the important revelations of Winston M. Burdett, it was surely not a 'dragnet' process to call appellant as a member of the working press to check on possible Communist Party activities among his fellow employees."

Thus, the court below held the Burdett testimony—that in the early '40s some Brooklyn Eagle and Newspaper Guild members had been Communists—sufficient to justify the Subcommittee's subpoenaeing at random, fifteen years later, *any* "working press" employee to question him about possible Communist associations.[5]

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[5] There are 5,700 New York Times employees; 30,000 "news reporting employees" in the country; and a far larger number of total employees on the 1,755 daily newspapers in the United States (see R. 129; 1959

2. *The "Question Under Inquiry" Issue*

From the moment that petitioner first came in contact with the Internal Security Subcommittee—when it served upon him a bifurcated subpoena for the appearance of "Willard Shelton or Robert Shelton"—there was bound to be confusion concerning the subject of inquiry upon which the Subcommittee sought his testimony. This doubt was repeatedly reflected at the executive Subcommittee hearing in 1955 where petitioner objected that "*the actual basis for the inquiry has not been stated to me, nor does it appear on the subpoena*" (R. 55). At that time petitioner was informed by Subcommittee counsel Sourwine that he had been called "to clear up a question of identity. The record will show that the witness was not charged with being a Communist (R. 56)." When called once more in the 1956 open hearing, petitioner again voiced his doubts as to what the inquiry was about, stating "I fail to see why I am involved in this hearing which the chairman said on Wednesday stems from the Burdett testimony. There was no reference to me in the Burdett testimony . . ." (R. 84). In the course of his 1956 interrogation the petitioner re-

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Annual Report of the New York Times; Editor and Publisher Yearbook, 1960; Occupational Outlook Handbook, 1959, Bureau of Labor Statistics Bulletin 1255). Apart from the dragnet subpoena power which the decisions below would grant to a Congressional committee to call any of thousands of press employees because it had information that some few were Communists, it should be noted that Mr. Sourwine repeatedly made clear that the Subcommittee did not call particular witnesses on any such generalized basis. The following answer by Mr. Sourwine is illustrative:

> "Q. I will repeat the question. Did the committee call the past and present New York Times employees before it in these executive and open sessions because it believed there was a high percentage of ex-communists on the Times?
>
> "A. No. The committee called these people before it *because it had information that the persons whom it called* were in a position to give the committee information about the matters it was investigating" (R. 155; see also 157). (Emphasis supplied)

peatedly reasserted his challenge to the jurisdiction of the Subcommittee, which had not yet explained the reason for his interrogation or the subject thereof—but all without avail.

The "question under inquiry" in the Subcommittee's January 1956 Times hearing was, from the first, doomed to remain in doubt, for the Subcommittee had never even met to authorize the investigation, much less to determine its scope. As Senator Hennings noted at the opening of the hearing (R. 72): "the committee has not met to determine whether one policy or another is to be pursued in the course of these hearings." The hearing accordingly covered a number of diverse and unrelated subjects without ever focusing on a single subject under inquiry. It has subsequently been suggested in this case (1) that there was no more limited question under inquiry than the Subcommittee's authorizing resolution—i.e. Communism generally; (2) that the question under inquiry was Communist infiltration into news media; (3) that the question under inquiry was Communism in the New York Typographical Union or in the New York area; and (4) that the question under inquiry was Communism on the New York Times. In this case, one or more of these "questions under inquiry" were espoused by the Subcommittee Chairman, by Senator Hennings, by the prosecuting attorney, by Government witness Sourwine, and by the courts below:

i. *Subcommittee Views.* The 1956 Times hearing was denominated by the Subcommittee, when it printed the hearing, as "Strategy and Tactics of World Communism, Communist Activity in New York" (Gov. Exh. No. 7). Senator Eastland, however, spoke of the hearing at the opening on January 4, 1956, as one to "pursue every lead which developed out of the Burdett testimony" (R. 71); he said "we are not . . . investigating any newspaper or

any group of newspapers" (R. 73). Senator Hennings, on the other hand, said, "the committee is interested in the extent and nature of so-called Communist infiltration, if such exists, into any news-dispensing agency" (R. 72).

ii. *Prosecution's Theory.* A radically different theory was expressed in the Government bill of particulars concerning the "question under inquiry" (see R. 16, 19-20). Prior to trial, petitioner had moved to quash the indictment because it failed to advise him of the "question under inquiry," an essential element of the crime under 2 U.S.C. § 192 (R. 9). Judge Holtzoff denied that motion (R. 19), whereupon counsel asked instead for a bill of particulars on "the nature of the question under inquiry before said committee" upon which the Government was relying under the indictment (R. 16, 19). Judge Holtzoff granted that request, whereupon the prosecution stated in open court that the question under inquiry which the Government would prove under the indictment was the authorizing language of Senate Resolution 366, *and no more limited inquiry* (R. 20):

> "As to the second asking, the Government contends, and the indictment states, that the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted.
>
> "This committee was conducting the inquiry for the purpose contained in the resolution and no lesser purpose so that, in that sense, the asking No. 2 of counsel will be supplied by his reading the resolution."

iii. *Sourwine Evidence.* A still different view of the "question under inquiry" emerged from the trial testimony of Government witness Sourwine. He testified that there were four diverse questions—Communism generally,

Communism among newspaper people, Communism on the Times, and Communism in the Typographical Union—*simultaneously* under inquiry at the time of petitioner's appearance (R. 138-139):

"Q. . . . I refer you to 2 U.S.C. 192, the contempt statute, which says that it shall be contempt for refusing to answer any question pertinent to the question under inquiry. I ask you, what was the question under inquiry when the defendant testified?

"A. Well, there are two ways to answer that. Broadly, the question under inquiry was the scope and extent and activities of the communist conspiracy against the United States, more specifically, as it applied to the New York area, and on the particular day he testified, and with regard to his testimony, still more specifically within that broader area, and we endeavored to get information about communist activity in the New York Times or in connection with employees of the New York Times or by such employees.

"Q. So there are three gradations.

"A. You can make as many gradations as you want. I am attempting to answer your question.

"The committee, every time it sits, Mr. Rauh, sits with its full authority. That authority is fixed by the Senate of the United States, and neither the full committee nor the subcommittee can change it. I am trying to be responsive to your question.

"When the committee was questioning this particular witness, within the area of its much broader investigation, it was concerned with the particular areas of that broader investigation which concerned communist activity among newspaper people, communist activity on the New York Times, and communist activ-

ity in an effort to infiltrate the Typographical Union in New York."

iv. *The Courts' Views.* Contrary both to the prosecution's bill of particulars (that the question under inquiry was S. Res. 366, i.e., Communism generally) and to the Subcommittee's witness Sourwine (that the question under inquiry was 4 different things), the District Court ruled in its opinion that "the Court finds that the hearing in question dealt with the existence and extent of subversive infiltration in the news media" (R. 225) and that "the subcommittee was then engaged in attempting to ascertain the extent and nature of Communist infiltration into news dispensing agencies" (R. 224). The Court of Appeals characterized the hearing as one to investigate "infiltration of Communists into the radio, TV, and the press" (R. 243). Neither of the opinions below makes mention of the bill of particulars, although the binding nature of the bill on the "question under inquiry" was explicitly urged before both courts below (R. 199-200; Appellant's Br. in Ct. App., pp. 17-21).

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On January 18, 1957, the District Court convicted petitioner on the first two counts of the indictment and acquitted him on the third count (R. 214). Prior to sentencing, petitioner's counsel requested suspension of any sentence of imprisonment, particularly in the light of the accepted consideration of petitioner's unblemished record. The Court told petitioner that "so far as your personal demeanor before the committee of the Congress, you didn't display the contemptuous attitude that many in the same category do." But the Court then sentenced him on each count to a fine and six months' concurrent imprisonment, without suspension, stating that "The press and the radio reports this morning matters that are very disturbing from

the standpoint of communism and its threats to our republican form of Government, and in this case I do not feel that I can put you on probation" (R. 228-231). The Court of Appeals affirmed the judgment of the District Court on June 18, 1960 (R. 232).

Summary Of Argument

I

The Senate Internal Security Subcommittee arbitrarily compelled petitioner to appear and testify before it in the course of its New York Times investigation without probable cause or reason to believe him possessed of pertinent information on its inquiry. In so doing, the Subcommittee violated petitioner's Fourth, Fifth and First Amendment rights.

Petitioner respectfully submits (a) that, contrary to the Government's position that a Congressional committee may call "a man off the street" and interrogate him by compulsory process concerning possible Communist associations, a Congressional committee may *not* constitutionally subpoena a witness without probable cause to believe that he has information relevant to the committee's inquiry; (b) that there was no such probable cause to summon petitioner; and (c) that the Subcommittee through its compulsory interrogation of petitioner under the circumstances presented by this record, was making an unjustified intrusion upon liberties of speech, press and association under the First Amendment.

A. This Court's prior rulings and the constitutional history reflected therein, preclude Congressional inquiry without "probable cause", just as they forbid all other forms of arbitrary Governmental intrusion upon the privacy of the citizen. Nothing in the history from which the Fourth

Amendment was born, nothing in the Amendment's language, nothing in this Court's adjudications or in the compelling exigencies of our time warrants the Government's startling conclusion that a Congressional committee may call "a man off the street" on pain of contempt if he refuses to answer. Under our Bill of Rights, no more may a Congressional committee search a man's mind without probable cause than a constable may search his papers or his pockets.

Ever since *Boyd* v. *United States*, 116 U.S. 616, compulsory Governmental process has been held to be subject to Fourth and Fifth Amendment limitations, whether issued by a court, a grand jury, a regulatory agency, or the Executive. This same principle was applied to Congressional committees in this Court's recent decisions, culminating in the Court's emphasis in *Wilkinson* v. *United States*, 365 U.S. 399, 412, upon the fact "that the petitioner was not summoned to appear as a result of indiscriminate dragnet procedure, lacking probable cause for belief that he possessed information which might be helpful to the subcommittee . . ."

Behind the adoption of the Fourth Amendment lay centuries of conflict in which Court, Crown and legislature had singly and in combination challenged the basic "right of privacy" of the citizen. To Englishmen confronted by the Court of Star Chamber or to colonists faced with writs of assistance, the protections later incorporated into our Bill of Rights were of broad and fundamental significance. Their unrelenting struggle against governmental intrusion on privacy of "persons, houses, papers and effects", provides what this Court recently called the "intellectual matrix" underlying the Fourth Amendment (*Marcus* v. *Search Warrants*, 367 U.S. 717, 729). The history of two centuries of oppression on both sides of the Atlantic was well known to the men who wrote our Constitution, for

they had not only resisted it in the Colonies, but their forefathers had fled from it in the mother country. The Federal Constitution was given its firm foundation by a specific Bill of Rights, whose interrelated guarantees of personal privacy, due process and political freedom, were intended forever to preclude unjustified intrusion on the homes, the possessions, the beliefs and expressions of its citizens.

B. The Subcommittee had no probable cause or reason to believe that petitioner had information pertinent to its inquiry. The trial court weakly and belatedly suggested and the court below later adopted the contention that probable cause was supplied by the testimony of one Winston M. Burdett concerning Communists in the media of communications some 15 years earlier. All apart from the fact that neither the Subcommittee nor the prosecution at the trial ever suggested any such loose rationale of probable cause (see n. 47, p. 50, *infra*), the court below fails to explain why it was not "a dragnet process" randomly to exercise the power of compulsory process among 30,000 members of the working press or 5,700 employees of the New York Times (see n. 5, p. 16, *supra*), on the mere chance or possibility that those subpoenaed might have information concerning Communist activities in the press or on the Times. Neither court below sought to square so sweeping and haphazard a use of compulsory process—a modern version of the odious "general warrant"—with the constitutional prohibition upon unreasonable search or the requirements of probable cause and due process.

If haphazard inquisition for Communists among presumably innocent members of the press or employees of the Times is not dragnet inquiry, then it is difficult to conceive of any inquiry which is. For there is no industry or profession in America today as to which someone has not

charged some degree of Communist infiltration, and thus, on the theory of the court below, any person in any industry or profession could be called without further ado (see n. 48, p. 52, *infra*). Neither the Fourth Amendment nor Fifth Amendment due process permit the haphazard use of Congressional subpoena power on the off chance that the witness, called at random from among thousands of newspapermen, may have information about Communist activity in the press.

C. The Subcommittee's action also violated the First Amendment. While the hearing record is replete with protestations that the Subcommittee was not investigating the press or the Times, but merely Communist influence therein, the full record demonstrates the contrary. In its interrogation of Times witnesses, the Subcommittee certainly did not restrict itself to questions about Communist Party membership and activity, but ranged widely into personal and private affairs. Thirty of the 38 witnesses called at the 1955 executive hearing were or had been connected with the Times and 15 out of 18 witnesses called at the 1956 public hearing were so connected (R. 145-149). The inevitable effect of wholesale interrogation and exposure of any alleged Communists or others the Subcommittee could find on the New York Times, is necessarily to discourage newspapers from hiring persons of unpopular, unorthodox, or minority views, past or present, who may become the subjects of similar Congressional scrutiny. The resulting elimination of persons from the press who hold or held minority views, is as effective a form of censorship and restraint as the deletion of the material they could contribute to the press.

Whatever might be said of the impact of the First Amendment when the Subcommittee questioned other witnesses in its New York Times hearing (as to whom it might have had reason to believe them possessed of pertinent informa-

tion), clearly the First Amendment imposes an insuperable bar to affirmance of this petitioner's conviction. In *Watkins* v. *United States*, 354 U.S. 178, 197, this Court referred to the necessary "accommodation of the Congressional need for particular information with the individual and personal interest in privacy" and concluded (at 198) that "the critical element is the existence of and weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness." Lacking any probable cause or reason to believe Shelton to have pertinent information on the Subcommittee's inquiry, there is no "Congressional need" presented here for "accommodation . . . with the individual and personal interest in privacy." There can be no Congressional need for the testimony of a victim of accident.

Whether the Subcommittee's interrogation of petitioner be deemed violative of Fourth, Fifth or First Amendment rights taken separately or together (or of the contempt statute's requirement of pertinency, see n. 53, p. 57, *infra*), it is clear that federal courts cannot, through contempt convictions, vindicate Congressional process under which newspapermen are arbitrarily called and questioned about Communism, without reason to believe that they have pertinent information on that subject.

II

There was no delimited "question under inquiry" before the Subcommittee at the time of petitioner's appearance.

1. The difficulties in this case concerning the nature of the "question under inquiry" in petitioner's interrogation began with the inquiry, were exacerbated at the trial, and remain unanswered even after judgment in the Court of Appeals. As we have demonstrated (see pp. 17 to 21, *supra*), successively different definitions of the question

under inquiry were given by Senator Eastland and by Senator Hennings at the hearing; by the Assistant United States Attorney in response to a requested bill of particulars; by Government witness Sourwine at the trial; and by the lower court opinions. Certainly, where the views of the Subcommittee members and of the prosecution, the trial evidence, and the findings of the lower courts on the "question under inquiry" are as diverse and inconsistent as in the instant case, it cannot be said that the point was made sufficiently luminous to the witness at the time of the Subcommittee interrogation to meet constitutional due process requirements. *Watkins* v. *United States,* 354 U.S. 178, 208-9. Whether it was because the Subcommittee did not yet have the guidance of the *Watkins* decision, or whether it was because the Subcommittee's primary interest was in the coercion of the New York Times, we respectfully submit that no one, from witnesses to Subcommittee counsel, from prosecutor to Subcommittee members, had the vaguest idea of any actual delimited question under inquiry in the January 1956 hearing of the Subcommittee.

2. Whether a sufficiently delimited inquiry was made manifest when petitioner was questioned need not be decided, for here the Government's bill of particulars on the "question under inquiry" to be proved under 2 U.S.C. § 192 calls directly into play this Court's *Watkins* holding that a general authorizing resolution is not itself sufficiently precise to serve as a "question under inquiry". In the District Court the prosecution, by its bill of particulars, elected to rely on precisely such a broad authorizing resolution (Senate Resolution 366) and no lesser inquiry as the "question under inquiry" to be proved under the indictment. While both courts below sought to find a more limited inquiry—Communist influence on the Times or in communi-

cations—the bill of particulars is, of course, binding for the proposition that no such limited question under inquiry was being pursued by the Subcommittee in its interrogation of petitioner. The only remaining question is whether Section 3 of Senate Resolution 366 (see p. 3, *supra*) has the specificity which this Court ruled in *Watkins* was lacking in the House Un-American Activities Committee authorizing resolution. Even cursory comparison of the two texts is sufficient to demonstrate that the almost identical substance of the Senate Resolution is no more precise as a "question under inquiry" than is that of the House. Thus the exact holding of *Watkins* that a general authorizing resolution does not constitute a sufficiently delimited "question under inquiry" is controlling in the instant case.

III

Petitioner's conviction must be reversed because the indictment failed to state the "question under inquiry." For the sake of brevity and convenience of the Court, petitioner Shelton relies on Argument II of the brief for petitioner in *Russell* v. *United States* (No. 8) and requests reversal on the authorities there presented.

IV

Petitioner was deprived of his right to a fair and impartial grand jury because 14 of the 23 members of the grand jury which voted the indictment against petitioner were, at that time, employed by the United States Government (R. 4). For the sake of brevity and convenience of the Court, petitioner Shelton relies on Argument I of the brief for petitioner in *Russell* v. *United States* (No. 8) and requests dismissal of the indictment.

ARGUMENT

I

In Violation of Fourth, Fifth and First Amendment Guarantees, the Subcommittee Arbitrarily Compelled Petitioner to Appear and Testify Before It in Its New York Times Investigation Without Probable Cause or Grounds to Believe Him Possessed of Pertinent Information on Its Inquiry.

From the very outset of petitioner's trial for contempt, the Government was aware of the major constitutional objection being interposed by petitioner in his defense, his counsel having challenged from the first the existence of any probable cause or reason for belief on the part of the Subcommittee that Robert Shelton had relevant information to give it. To that challenge the prosecution promptly replied by asserting the right of the Congressional Committee to call "*a man off the street*" and interrogate him by compulsory process concerning possible Communist associations.[6] It was essentially this theory which the District Court's opinion of conviction adopted; the District Court held itself powerless to permit a Congressional Committee "to compel the attendance and testimony of only such witnesses as the courts might judicially determine were reasonably expected to be in possession of pertinent

[6] In a second suggested line of defense the prosecutor proposed to prove that the Subcommittee actually had probable cause to call and question the petitioner. This second line of defense came to an end at the trial when the Government refused to produce the "anonymous letter" upon which it had sought to rely as the Subcommittee's "probable cause" for having interrogated petitioner, and thus the trial court as well as the court below carefully avoided reliance upon the supposed letter. In this Court and the courts below the Government has not suggested any theory upon which the supposed letter withheld at the trial can be relied upon in any way to sustain petitioner's conviction and thus there is no need to consider whether an anonymous letter could ever constitute probable cause. Cf. *Cochran* v. *United States*, 291 F. 2d 633.

information." In short, the District Court refused to entertain the Fourth Amendment objection as an issue cognizable in a contempt of Congress prosecution under 2 U.S.C. § 192. The first and signal question thus presented is whether it is an appropriate defense to a prosecution for contempt, that the Committee subpoenaed the witness arbitrarily and without probable cause or any reason to believe him possessed of pertinent information on the subject of its inquiry.[7]

If, however, as we will seek to show, the Fourth Amendment *does* apply to compulsory Congressional process, there then arises as a second issue for this Court's adjudication the existence or nonexistence of probable cause for petitioner's interrogation by the Subcommittee. This issue arises by virtue of the District Court's afterthought

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[7] Not only in the District Court but in this Court the Government appears to prefer the "man off the street" rationale which denies the applicability of the Fourth Amendment rather than attempting to rationalize the record in this case with the Amendment's commands. Thus, in the Government's Brief in Opposition here, it argued the inapplicability of the Fourth Amendment to petitioner's compelled interrogation before the Subcommittee, stating (pp. 10-11):

> ". . . while the Fifth and First Amendments protect witnesses who appear before Congressional committees, neither the language of the Fourth Amendment nor the decisions of this Court suggest that the scope of the Amendment extends to subpoenas to testify. On the contrary, the Amendment makes clear that it was intended to protect 'persons, houses, papers, and effects' from improper search or seizure, and not, like the Fifth Amendment, to protect witnesses from being forced to testify. This Court has never held that the Fourth Amendment is relevant to subpoenas requiring witnesses to appear and testify. In *Boyd* v. *United States*, 116 U.S. 616, and the other cases cited by petitioner (Pet. 23-24), the Court decided that the Fourth Amendment applies to subpoenas *duces tecum* because the 'compulsory production of a man's private papers' 'accomplishes the substantial objects of [the] acts' of 'forcible entry into a man's house and searching amongst his papers'. 116 U.S. at 622. In contrast, the requirement that a person appear briefly before a Congressional committee does not accomplish the substantial object—or interfere with his right to the same extent—as seizure of his person by arrest."

suggestion, later adopted as the sole rationale of the Court of Appeals' disposition of the "probable cause" point, that probable cause existed for petitioner's compulsory interrogation on the chance that, as an employee of the Times or as a member of the working press, he would have information concerning Communist activity among his fellow employees (R. 223, 244).[8]

Finally, the Subcommittee, through its compulsory interrogation of petitioner under the circumstances presented by this record, was making an unjustified intrusion upon liberties of speech, press and association under the First Amendment. While this constitutional objection was rejected by the lower courts, neither court below sought to square the arbitrary or haphazard use of the subpoena as applied to an employee of the New York Times with this Court's *Watkins* ruling that only manifest legislative need will justify Congressional investigatory intrusion upon First Amendment rights. The Subcommittee's intrusion here on those rights underlines the importance of adherence to procedural guarantees which stand as a foremost protection against governmental repression of political freedoms.

We turn now to each of these three points to demonstrate (a) that a Congressional committee may not constitutionally subpoena a witness without probable cause to believe

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[8] The opinion of the Court of Appeals below is not entirely clear in this regard. The Court said, "After the important revelations of Winston M. Burdett, it was surely not a 'dragnet' process to call appellant as a member of the working press to check on possible Communist Party activities among his fellow employees" (R. 244). The court below appears to be saying that after Burdett's testimony the Subcommittee could call any member of the working press, rather than just any member of the New York Times. The use of the words "fellow employees", however, makes this unclear. But as we show in the text (pp. 50 to 53, *infra*), there was no probable cause to call petitioner either as an employee of the Times *or* as a member of the working press.

that he has information relevant to the committee's inquiry (pp. 32 to 50, *infra*); (b) that there was no such probable cause to summon petitioner (pp. 50 to 53, *infra*); and (c) that the Subcommittee was also making unjustified intrusion upon liberties of speech, press and association in the circumstances of this case (pp. 53 to 56, *infra*).

A. *This Court's prior rulings and the constitutional history reflected therein, preclude Congressional inquiry without "probable cause", just as they forbid all other forms of arbitrary Governmental intrusion upon the privacy of the citizen.*

From the time that the prosecution announced its position that the Internal Security Subcommittee could call a man off the street (R. 40) to the time that the Solicitor General opposed certiorari on the ground that the Fourth Amendment does not apply to "the requirement that a person appear briefly before a Congressional committee" (see n. 7, p. 30, *supra*), the Government has adamantly maintained that no probable cause is required for the Congressional utilization of compulsory process.[9] But nothing

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[9] The Government also suggested in its Opposition to the grant of certiorari that petitioner failed to raise his Fourth Amendment objection before the Subcommittee at the time of his appearance, and accordingly was not entitled to urge it in the courts (p. 9). It is perhaps enough, in answer to this "waiver" contention, to point out that it was never urged by the Government at petitioner's trial nor even in the Court of Appeals below. But even assuming that the Government can urge for the first time in this Court that petitioner's Fourth Amendment objection came too late in the District Court, there are three separate and conclusive answers to the Government's "waiver" suggestion:

First, petitioner *did* assert his Fourth Amendment objection before the Subcommittee when he objected that he had been called as a victim of accident, had no pertinent information to give the Subcommittee and did not understand "why I am involved in this hearing" (R. 84, 87, 89). As this Court pointed out in its ruling in *Quinn* v. *United States*, 349 U.S. 155, 162-63, no "special combination of words" is required to assert con-

in the history from which the Fourth Amendment was born, nothing in the Amendment's language, nothing in this Court's adjudications or in the compelling exigencies of our time warrants the Government's startling conclusion. *Under our Bill of Rights no more may a Congressional committee search a man's mind without probable cause than a constable may search his papers or his pockets.* The suggestion that a brief appearance before a Congressional committee constitutes neither a search nor a seizure of the person within the meaning of the Fourth Amendment is wholly novel and utterly lacking in support. The proposition is repelled by this Court's prior rulings, and the constitutional history upon which they are predicated and which gives them vitality. We review here-

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stitutional objections at a Congressional hearing, so long as the substance of the objection is made manifest. And, if it sufficed to raise a Fifth Amendment due process objection for petitioner Watkins to state that the question propounded to him was not "relevant", then certainly it sufficed here to raise Fourth Amendment and Fifth Amendment due process objections for petitioner Shelton to urge that he had been called for no apparent reason, as a result of an accident, and that he had no pertinent information to give to the Subcommittee.

Second, it should be noted that this Court has previously deemed the Fourth Amendment to be adequately preserved for invocation before the courts in the absence of an express waiver thereof. See *Amos* v. *United States*, 255 U.S. 313; *Johnson* v. *United States*, 333 U.S. 10. That same solicitude for constitutional rights precludes a finding of a waiver of constitutional rights here, where no waiver was intended or expressed. If Fourth Amendment rights are preserved though the citizen silently acquiesces in the search and seizure of his premises, they are all the more preserved by a witness who specifically *objects* to the Governmental process to which he is subjected—as did this petitioner.

Thirdly, as we suggest *infra* at n. 53, p. 57, if petitioner was called without probable cause to believe that he had pertinent information to give, then no offense has been made out under the statute, which punishes only refusal to answer questions pertinent to a pending inquiry. Certainly, if reason for belief that the witness has pertinent information is a necessary ingredient of the offense under 2 U.S.C. § 192, then the Government's proof of the issue fails if petitioner's contention is upheld. No pre-prosecution "waiver" by a defendant could supply a necessary element of the offense charged.

in these adjudications and that constitutional history, which demonstrate the necessity for applying to Congressional committee process in full and unattenuated form, constitutional guarantees against arbitrary governmental inquisition into the citizen's conduct, beliefs and associations.

1. *This Court's Adjudications.* Ever since *Boyd* v. *United States*, 116 U.S. 616, compulsory Governmental process has been held to be subject to Fourth and Fifth Amendment limitations, whether issued by a court (as in *Boyd*), a grand jury (*Hale* v. *Henkle*, 201 U.S. 43), a regulatory agency (*Interstate Commerce Comm.* v. *Brimson*, 154 U.S. 447), or the Executive (*Okla. Press Pub. Co.* v. *Walling*, 327 U.S. 186). Moreover, this Court has repeatedly made clear in its adjudication of Congressional contempt cases, that just like other Governmental departments, Congress may not make unreasonable or arbitrary use of compulsory process.

As early as *Sinclair* v. *United States*, 279 U.S. 263, 292, in a thorough analysis of the Congressional investigatory power, this Court reviewed its interdictions of "fishing-expedition" abuse, and declared:

> "It has always been recognized in this country, and it is well to remember that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures . . ."

More recently, in *Watkins* v. *United States*, 354 U.S. 178, 188, this Court emphasized that

> "The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves.

> They cannot be subjected to unreasonable search and seizure."

Again, in upholding the conviction in *Barenblatt* v. *United States*, 360 U.S. 109, 134, this Court noted that Barenblatt's interrogation did not involve "*indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee.*" Finally, only this year this Court unequivocally announced in its decision in *Wilkinson* v. *United States*, 365 U.S. 399, 412, that:

> "It is to be emphasized that the petitioner was not summoned to appear as a result of indiscriminate dragnet procedure, lacking probable cause for belief that he possessed information which might be helpful to the subcommittee. . . . the subcommittee had reason to believe at the time it summoned the petitioner that he was an active Communist leader. . . ."

The Court's opinion reemphasized the same point when it stated "the subcommittee had reasonable ground to suppose that the petitioner . . , possessed information that would substantially aid it in its legislative investigation."

This Court's continuing insistence upon the applicability to Congress of constitutional guarantees against arbitrary or dragnet inquisition, reflects the Court's awareness of the central significance attaching in our democratic form of government to individual privacy, free from all forms of unjustified Governmental intrusion by force or by compulsion of law. Perhaps the classic summary of this "first principle" is that by Mr. Justice Brandeis, dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 478:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They

recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. *They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.* And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth." (Emphasis supplied)

In *Olmstead*, Mr. Justice Brandeis echoed this Court's earlier formulation in *Interstate Commerce Comm.* v. *Brimson*, 154 U.S. 447, 478-479, summarizing constitutional limitations which *"for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress"*:

"In accomplishing the objects of a power granted to it, Congress may employ any one or all the modes that are appropriate to the end in view, taking care only that no mode employed is inconsistent with the limitations of the Constitution.

"We do not overlook those constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry

into the private affairs of the citizen. *Kilbourn* v. *Thompson*, 103 U.S. 168. We said in *Boyd* v. *United States*, 116 U.S. 616, 630—and it cannot be too often repeated—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employes of the sanctity of a man's home, and the privacies of his life. As said by Mr. Justice Field in In re Pacific Railway Commission, 32 Fed. Rep. 241, 250, 'of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.' "

Finally, as this Court has many times emphasized, the guiding formulation in adjudications under the Fourth and Fifth Amendments, which "run almost into each other", is provided by its landmark decision in *Boyd* v. *United States*, 116 U.S. 616, 630. There, in finding invalid Congressional legislation intruding upon Fourth Amendment protections, this Court warned that

> "The principles laid down in this opinion [*Entick* v. *Carrington*] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his inde-

> feasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment."

The foregoing authorities provide a complete answer to the "man off the street" theory which would render it a contempt of Congress for a witness to refuse to answer, even though subpoenaed utterly unreasonably and wholly without probable cause. Yet we deem this case and the issue presented to be of sufficient importance to justify review of further constitutional authority. To this end we present below the relevant constitutional history which underlines the Fourth Amendment's unattenuated application to the search of men's minds by compulsory Congressional process.

2. *The Relevant Constitutional History.* Behind the adoption of the Fourth Amendment lay centuries of conflict in which Court, Crown and legislature had singly and in combination challenged the basic "right of privacy" of the citizen. To Englishmen confronted by the Court of Star Chamber or to colonists faced with writs of assistance, the privacy and security later guaranteed by our Bill of Rights were of broad and fundamental significance. Their unrelenting struggle against governmental intrusion on privacy of "*persons, houses, papers, and effects*", provides what this Court recently called the "intellectual matrix"

underlying the Fourth Amendment (*Marcus* v. *Search Warrants*, 367 U.S. 717).

The "right of privacy" received early recognition in the maxim "every man's house is his castle." [10] Sir Edward Coke cites it at the beginning of the 17th Century but it has earlier antecedents.[11] While the maxim emphasizes the sanctity of the dwelling, early evidence suggests concern with intrusion on the liberty and security of the person. Thus, *The Mirrour of Justices*[12] reports that the Ninth Century Anglo-Saxon king, Alfred the Great, "hanged Ostline because he judged Seaman to death by a false warrant, grounded upon false suggestion, which supposed Seaman to be a person in the warrant, which he was not." [13]

Yet documents from the Anglo-Norman period suggest that Englishmen gained early familiarity with inquisitorial methods. A study of that period indicates the issuance of general commissions of inquiry, such as for the arrest of all suspected of having committed a certain type of offense.[14] However, the early resistance of the English

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[10] Or, as Pitt was to phrase it in the Eighteenth Century, "the poorest man, may, in his cottage, bid definance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement." Quoted in Cooley, *A Treatise on Constitutional Limitations* (8th ed. 1927), I, 611, n. 1.

[11] Actually the maxim pre-dates recorded English history. Professor Max Radin contends that it comes directly from Roman law: "nemo de domo sua extrahi debet." Radin, *Handbook of Roman Law* (1927), p. 475, n. 28.

[12] Usually this work is attributed to Andrew Horne. While it was probably written in the latter half of the Thirteenth Century, the material used predates the Norman Conquest.

[13] Horne, Andrew, *The Mirrour of Justices*, (1903 ed., Washington), ch. V, sec. 1, p. 246. Alfred also "hanged Muclin because he hanged Helgrave by warrant of indictment not special." Id. at 248.

[14] *Select Cases Before the King's Council*, 1243-1482 (I. S. Leadam and J. F. Baldwin, edd.), "Selden Society Publications" (Cambridge, 1918), XXXV, p. xl.

people to such methods also is indicated by the enactment, in 1360, of a statute pertaining to the powers of the justices of the peace. "The King will," the statute provided, "*that all general inquiries before this time granted within any seignories, for the mischiefs and oppressions which have been done to the people by such inquiries, shall cease utterly and be repealed.*" [15]

The Fourteenth century also witnessed the first enactment of statutes granting general powers of search and seizure. In 1335, innkeepers in passage ports were instructed to search guests for false money imported and were rewarded with a percentage of any resulting forfeiture. Official searchers in turn were to search the inns to check on the innkeepers.[16] Significantly, by 1402 it was necessary to enact further legislation to regulate abuses among these official searchers. See 4 Hen. IV, ch. 21. In the reign of Henry VI, the Company of Dyers in London was granted the privilege of searching for and seizing cloth dyed with logwood.[17] And a few years later, a statute gave the governing authorities of every city, borough, or town, and the masters and wardens of all tallow-chandlers, "full power and authority to search all manner of oils brought into the said city of London to be sold, in whose hands they be or shall be found, and that as often as the case shall require." [18] These early dragnet warrants are of importance as precedents for later action. The writs of assistance of colonial America stem directly from them, as do proceedings of the Star Chamber and later Parliamentary enactments designed to ferret out the great offenses of the

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[15] 34 Edw. III, ch. 1 (1360).

[16] 9 Edw. III, St. II, ch. 11 (1335).

[17] See Thomson, *Historical Essay on the Magna Charta of King John* (1829), p. 226.

[18] 3 Hen. VIII, ch. 14 (1511).

Fifteenth, Sixteenth and Seventeenth Centuries—heresy and subversion.

In due course, in the Elizabethan, Stuart, and Cromwellian periods, the history of search and seizure "runs into a broader channel." [19] It is during these periods that abuse of the right of privacy became a weapon for the suppression of nonconformist utterance and belief. In 1566, the Privy Council issued an ordinance in aid of the licensing of books and the restricting of printing,[20] noteworthy for granting to the wardens of the Stationers' Company authority to open all packs and trunks of papers and books brought into the country, to search in any warehouse, shop, or any other place where they suspected a violation of the laws of printing to be taking place.[21] Subsequently, the Star Chamber Decree of 1586 recited that the various laws and ordinances to regulate printing had been totally unheeded and ineffective and provided for stricter censorship, more rigorous penalties, and similar unlimited powers of search and seizure.[22] Increasingly, the jurisdiction of the Court of Star Chamber and of its ecclesiastical counterpart, the Court of High Commission, were expanded in the detection and punishment of nonconformism, seditious libel, and parallel offenses.[23] To

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[19] Lasson, *History and Development of the Fourth Amendment to the U. S. Constitution* (1937), p. 24.

[20] Reprinted in Tanner, *Tudor Constitutional Documents* (1st ed., 1922), 245-47.

[21] See Arber, *Transcript of the Registers of the Company of Stationers of London* (London, 1894), (Reprint ed., New York 1950), I, p. 322.

[22] Ibid., II, pp. 807-812.

[23] The Star Chamber, initially established to redress the rigidity of the common law in order to secure justice, became the symbol of governmental oppression. It was exactly because it was outside the common law tradition that it could later dispense with those rudimentary procedural protections afforded by the common law courts and resort to summary proceedings and torture. Because of the ease of obtaining convictions, the Star Chamber ultimately assumed jurisdiction even in ordinary libel cases. According to Lord Camden, it was because of this

this end, no limitations were observed in granting messengers powers of search and arrest. "Persons and places were not necessarily specified, seizure of papers and effects was indiscriminate, everything was left to the discretion of the warrant. Oath and probable cause, of course, had no place in such warrants, which were so general that they could be issued upon the merest rumor with no evidence to support them and indeed for the very purpose of possibly securing some evidence in order to support a charge."[24]

In 1634, the Court of High Commission issued circulars to all peace officers directing them to search every room of any house where they should have intelligence that nonconformist services were being held, to arrest all persons there assembled, and to seize all unlicensed books.[25] Such general warrants of the broadest kind were not uncommon throughout these years. Finally, as an act of desperation, in 1637 the Star Chamber issued another ordinance placing still stricter censorship upon everything printed. Searchers were given authority in even more blanket terms than before and express provision was made that they could search at any time of the day or night they saw fit.[26]

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practice that there were no libel cases in the Court of King's Bench before the Restoration. See *Entick* v. *Carrington*, XIX State Trials (Howell) 1029, 1069 (1765).

[24] Lasson, *History and Development of the Fourth Amendment to the U. S. Constitution* (1937), 26. Thus, a Privy Council warrant was issued in 1596 for the apprehension of a certain printer, upon information "which maye touche" his allegiance, with authority to search for and seize "all bookes, papers, writinges and other thinges whatsoever that you shall find in his house to be kept unlawfully and offensively, that the same maie serve to discover the offense wherewith he is charged." *Acts of the Privy Council*, Dasent (ed.), (1902), XXVI, 425. In 1593, the Court of Star Chamber isued a warrant to three messengers authorizing them to search for and arrest every person suspected of producing certain objectionable and allegedly libelous posters "and for that purpose to enter into all houses and places where anie such maie be remaining." Ibid., XXIV, 222.

[25] Stephen, *History of Criminal Law in England* (1883), II, 426-7.

[26] Arber, *Transcript of the Registers of the Company of Stationers of London* (1894), IV, pp. 529-36

In the same year, John Lilburne, the great Leveller, first encountered serious difficulty with the Crown. Lilburne was charged with importing books critical of the episcopate. At his trial, he freely answered questions relating to the crime with which he had been charged but, when the interrogation turned to the conduct of other men and his relation with them, he refused to answer, stating that these questions were "nothing pertinent to my imprisonment, for I am not imprisoned for knowing and talking with such and such men, but for sending over books. . . ."[27] Lilburne's refusal to answer questions was not based on any absolute privilege against self-incrimination, as was his defense in subsequent trials, but against random inquiry which went beyond the accusation against him. His defense did not save him from being judged in contempt and punished, but it aroused the widespread resentment which hastened the overthrow of the Courts of Star Chamber and High Commission in 1641. Unfortunately, the demise of these bodies did not signal greater concern for the citizen's rights. The persecuted became persecutors; orthodoxy was now suspect rather than nonconformism.

Yet while the abuse of privacy was commonplace during and after the Puritan Revolution, there were exceptions to the rule. In 1621, a member of Parliament was recommending that general warrants should not be issued so frequently.[28] Following the Revolution, the Earl of Stafford was impeached, in part because he had granted to a certain bishop and his subordinates a general warrant of arrest.[29] Many pamphlets appeared denouncing a Cromwellian excise tax and the procedures of its enforcement.[30] Such

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[27] III State Trials (Howell) 1315, 1318 (1637).

[28] See Lasson, *History and Development of the Fourth Amendment to the U.S. Constitution* (1937), 29.

[29] III State Trials (Howell) 1381, 1391 (1640).

[30] See citations in Kennedy, *English Taxation* (1913), p. 62 notes 1 and 4.

procedures provoked remonstrances from "a public opinion which was becoming more and more sensitive to arbitrary practice and more alive to what ought to be the right of the individual."[31] Moreover, even while the Crown and Commonwealth were utilizing general warrants and arbitrary search and seizure, the common law was fashioning safeguards.

Sir Matthew Hale's work, *History of the Pleas of the Crown*, published in 1680, is indicative of this trend. According to Hale, great emphasis must be placed on oath, probable cause and particularity of the person to be apprehended. The warrant, when issued, must "express the name of the party to be taken; for a warrant granted with a blank and sealed, and after filled up with the name of the party to be taken is void in law."[32] Furthermore, "where upon a complaint to a justice of a robbery he made a warrant to apprehend all persons suspected, and bring them before him, this was ruled a void warrant. . . ."[33] And in a later passage Hale concludes " . . . a general warrant upon a complaint of robbery to apprehend all persons suspected, and to bring them before, etc., was ruled void, and false imprisonment lies against him that takes a man upon such a warrant."[34]

At the same time, the executive and legislative branches continued to disregard common law procedures and to sanction abuses and it was becoming increasingly apparent that these conflicting attitudes toward individual privacy could not continue side by side. The issue was finally to be resolved in a series of opinions by Lord Camden,

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[31] Lasson, *History and Development of the Fourth Amendment to the U. S. Constitution* (1937), p. 34.

[32] Hale, *History of the Pleas of the Crown* (London, 1778 ed.), I, 577.

[33] Ibid., II, 112.

[34] Ibid., I, 580.

but even before these were handed down there were signs of reform. Late in the reign of Charles II, Chief Justice Scroggs issued general warrants. Subsequently, in 1680, he was impeached by the House of Commons, in part because of his issuance of "general warrants for attaching the persons and seizing the goods of his majesty's subjects, not named or described particularly in the said warrants."[35] After the Glorious Revolution, one of the first acts of the new government was to abolish "heath-money", in the collection of which officials had been exercising the right of entry into all houses any time during the day.[36] Yet intrusions did not end, and secretaries of state continued to issue general warrants in seditious libel and similar cases. It was the issuance of such a warrant that set the stage for Lord Camden's historic pronouncements on the right of privacy.

In 1762, John Wilkes, a member of Parliament, began his anonymous publication of a series of pamphlets entitled the *North Briton*. The tenor of the publications was one of scorn for the incumbent government. The pamphlets continued until the following year, when *Number 45* of the series appeared, containing an unusually bitter attack. At this point a warrant was issued to four messengers by Lord Halifax, the secretary of state, ordering them "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, the *North Briton, No. 45.*"[37] The warrant was general in all respects: As to persons to be arrested, places to be searched and papers to be seized. "Of course, probable cause upon oath could necessarily

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[35] VIII *State Trials* (Howell) 163, 200 (1680).

[36] I *Wm. and M.*, ch. 10 (1688).

[37] Reprinted in *The King* v. *Wilkes*, 2 Wils. K. B. 151, 95 Eng. Rep. 737 (1763).

have no place in it since the very questions as to whom the messengers should arrest, where they should search, and what they should seize, were given over into their absolute discretion. Under this 'roving commission', they proceeded to arrest upon suspicion no less than forty-nine persons in three days." [38]

One of the printers of the *North Briton*, Dryden Leach, had worked on other numbers of the series but not on Number 45. However, he was arrested during the night, together with his employees, and all of his papers were seized. The messengers did this on the following information: "Mr. Carrington, the messenger, told three other messengers, who executed the warrant, that he had been told by a gentleman, who had been told by another gentleman, that Leach's people printed the paper in question." [39] The actual printer of *Number 45* was finally apprehended and from him it was learned that Wilkes was the author of the pamphlet. Wilkes was forcibly taken into custody, and had all his private papers seized.

The arrested printers brought suit against the messengers for false imprisonment.[40] Chief Justice Pratt, later Lord Camden, held the warrant to be illegal. "To enter a man's house by virtue of a nameless warrant in order to procure evidence," said the Chief Justice, "is worse than the Spanish inquisition; a law under which no Englishman would wish to live an hour." [41] Wilkes then brought suit against Wood, the undersecretary who had superintended the execution of the warrant. In his decision of Wilkes' suit, Pratt declared that the *North Briton* war-

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[38] Lasson, *History and Development of the Fourth Amendment to the U. S. Constitution* (1937), 43.

[39] Letter from Nuthall to Pitt, July 7, 1763, in *Correspondence of William Pitt* (Taylor and Pringle, edd., 1838), II, 230, 233.

[40] *Huckle* v. *Money*, 2 Wils. K. B. 206, 95 Eng. Rep. 768 (1763).

[41] Id. at 207, 769.

rant presented a point of the greatest consequence that he had ever met with in his whole practice, and ruled in favor of the plaintiff:

> *"The defendants claimed a right, under precedents, to force persons' houses, break open escritores, seize their papers, etc., upon a general warrant, where no inventory is made of the things thus taken away, and where no offendors' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."* [42]

A few years later, in 1765, Lord Camden had another opportunity to rule on a similar intrusion and, in so doing, rendered an opinion accepted as a landmark of English liberty. Shortly before the *North Briton* incident, Lord Halifax had issued a warrant to the messengers to search for John Entick, author of the *Monitor or British Freeholder*. The warrant was specific as to person but general as to the possessions. Following the Camden ruling on the *North Briton* warrant, Entick sued in trespass for the seizure of his papers. Camden held the warrant illegal, for "if this point should be determined in favor of the jurisdiction," he said, "the secret cabinets and bureaus of every subject in this kingdom will be thrown open to

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[42] *Wilkes* v. *Wood*, 19 How. St. Tr., col. 1153. Other suits followed. Wilkes later sued Lord Halifax, collecting £4,000. The much abused printer, Dryden Leach, brought suit against the messengers, winning £400. The government defended all actions arising from the warrant and payed all judgments. The expenses incurred were estimated at £100,000. See May, *Constitutional History of England* (1861), II, 258-59.

the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel."[43]

Camden's decisions against the government were received with much acclaim throughout England and signalled the end of the use of general warrants. Camden became one of the most popular men in the country, and was elevated to the lord chancellorship in 1766. Wilkes and Entick were national heroes. Nor was the response limited to England. "Wilkes and Liberty" became a rallying cry in the oppressed Colonies. There, the rationale of Lord Camden's opinions had already been anticipated in 1761 in James Otis' historic challenge to the colonial writs of assistance.[44] Speaking of writs of assistance, Otis held that they were "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book."[45] While Camden's declarations of liberty were readily accepted in England, only by force of arms did the colonists ultimately win for themselves the freedom pleaded for by Otis.

The history of centuries of inquisitorial oppression on both sides of the Atlantic was well known to the men who wrote our Constitution, for they had not only resisted it in the Colonies, but their forefathers had fled from it in the mother country. In the victorious Colonies, the Federal Constitution was given its firm foundation by a specific Bill of Rights, whose interrelated guarantees of privacy, due process and political freedom, were intended forever

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[43] *Entick* v. *Carrington*, XIX *State Trials* (Howell) 1029, 1063 (1765).

[44] *Paxton's Case*, Quincy's Mass. Rep. 51 (1761).

[45] See Tudor, *Life of James Otis* (1823), 63.

to preclude arbitrary intrusion on the home, the person, the possessions, the beliefs and the expressions of the citizen.

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Petitioner may have belabored unduly the proposition that no man may be called before a Congressional committee without probable cause to believe that he has information pertinent to the committee's inquiry. If we have in fact unduly belabored this proposition, it was because, as we indicated earlier, the Government has adamantly maintained in the courts below and even in this Court (Brief in Opposition, pp. 10-11), the Subcommittee's right to call the man off the street to compel him to answer questions about Communism.

We respectfully submit that the long line of precedents of this Court, running from *Boyd* and *Brimson* to *Watkins*, *Barenblatt* and *Wilkinson*, leaves no doubt that the Government's man-off-the-street contention must be rejected and the principle adhered to that Congressional committees, like courts, grand juries, federal agencies and the Executive, can neither search a man's mind without probable cause nor seize his person, his possessions or his property on mere surmise or conjecture. And were there no adjudications and statements from this Court dispositive of the Government's contention that Congressional committees may exercise the power of compulsory process without probable cause, that conclusion is equally repelled by the relevant constitutional history which gives life and meaning to Bill of Rights guarantees against arbitrary or unjustified intrusion upon the person, his possessions and his privacy. As we have seen, political tyranny was effectively implemented in pre-revolutionary times in the Colonies and in the mother country by the use of general

warrants and it was just these forms of governmental compulsion which the requirement of probable cause was intended henceforth to preclude.

Accordingly, petitioner having demonstrated the utter untenability of the Government's principal theory—that the Fourth Amendment's requirement of probable cause is inapplicable to Congressional inquiry conducted on pain of contempt—there remains but the afterthought suggestion first enunciated in the District Court's opinion and later espoused as the rationale below, that petitioner's mere employment as a member of the working press or by the New York Times constitutes probable cause for his interrogation by the Subcommittee about possible Communist associations or sympathies. We turn now to a brief consideration of this rationalization of probable cause on what might be called a theory of "guilt by newspapermanship."

B. *The Subcommittee Had no Probable Cause or Reason to Believe that Petitioner Had Information Pertinent to its Inquiry.*

A theory weakly and belatedly suggested in the trial court's opinion and later adopted by the court below, was that "after the important revelations of Winston M. Burdett,[46] it was surely not a 'dragnet' process to call appellant as a member of the working press to check on possible Communist Party activities among his fellow employees" (R. 244).[47] The court below fails to explain why

[46] Quite clearly the calling of petitioner would have been arbitrary, haphazard and dragnet even if Burdett had testified to contemporaneous Communist activity in the press or on the Times. Actually, of course, Burdett testified principally concerning Communism on the Brooklyn Eagle and in the Newspaper Guild 15 years earlier (see n. 1, p. 5, *supra*).

[47] In the text we emphasize that the rationale adopted below, validating the calling of a man off the working press or the New York Times to inquire into possible Communist association or activity, violates constitutional guarantees. However, the adoption below of this rationale is also

it was not "a dragnet process" randomly to exercise the power of compulsory process among 30,000 members of the working press or 5,700 employees of the New York Times (ee n. 5, p. 16, *supra*), on the mere chance or possibility that those subpoenaed might have information concerning Communist activities in the press or on the Times. Neither court below sought to square so sweeping and haphazard a use of compulsory process—a modern version of the odious "general warrant"—with the constitutional prohibition upon unreasonable search or the requirements of probable cause and due process.

We submit that the Fourth Amendment precludes compulsory process in the nature of a fishing expedition for

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defective in two other important respects. These both flow from the fact, as Sourwine himself affirmed (see n. 5, p. 16, *supra*), that the Subcommittee did *not* call petitioner because he was a member of the press or of the Times, a rationale which was never suggested in this case until the trial judge rendered his opinion.

First, we do not believe that a District Court can validate the Congressional process being vindicated by prosecution for contempt upon a *different theory* from that under which the Subcommittee actually issued its process and sought to enforce it. While no precisely applicable case in point has been found, the lower courts' validation of Congressional process on a theory never pursued by the Subcommittee is at odds with two lines of this Court's adjudications represented by *Securities Comm'n.* v. *Chenery Corp.*, 318 U.S. 80, and *Service* v. *Dulles*, 354 U.S. 363. Both of these authorities and the cases which follow them stand against the judicial validation of the action of a coordinate branch of the Government on a theory different from that actually pursued by the coordinate branch. Judicial substitution seems equally impermissible when the courts are asked to enforce Congressional process by use of a theory under which Congress has not yet issued its process.

Second, even if judicial substitution were permitted, the substitution came too late in this case, for the alternative theory of the validity of the subpoena in this case was never suggested until the District Court's verdict. Far from suggesting it, the evidence of Subcommittee counsel Sourwine (n. 5, p. 16 *supra*) repelled the expansive theory that the Committee would call any member of the press or the Times at random. In these circumstances, we suggest that this Court's ruling in *Giordenello* v. *United States*, 357 U.S. 480, bars affirmance of petitioner's conviction on a theory he had no opportunity to rebut at his trial, since it was never there suggested prior to the verdict.

pertinent revelations, whether applied to the man off "the working press" or "The New York Times." This Court cannot accept the rationale adopted below without turning its back upon the constitutional history which lies at the foundation of the Bill of Rights, particularly the rejection of general warrants in *Wilkes* v. *Wood* and *Entick* v. *Carrington*, rulings which are part and parcel of our own guarantees against arbitrary or unreasonable governmental intrusion. See *Boyd* v. *United States*, 116 U.S. 616; *Marcus* v. *Search Warrants*, 367 U.S. 717.

A Congressional warrant for any or all members of the working press or any or all New York Times employees to check on "possible Communist Party activities" among fellow employees (R. 244) is as general and dragnet in nature as was the Star Chamber and High Commission process or the warrant for the unnamed printers of the *North Briton*. If haphazard inquisition for Communists among presumably innocent members of the press or employees of the Times is not dragnet inquiry, then it is difficult to conceive of any inquiry which is.[48] Neither the Fourth Amendment nor Fifth Amendment due process permit the haphazard use of Congressional subpoena power on the off chance that the witness, called at random from among thousands of newspapermen, may have information about Communist activity in the press.

Finally, it cannot be disregarded that to the grievous

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[48] We respectfully suggest that the court below failed to see the true dimensions of its own holding. For there is no industry or profession in America today as to which someone has not charged some degree of Communist infiltration, and thus, any person in any industry or profession could be called under the boundless theory adopted below. And, if the theory of the court below should conceivably be validated, then on the same theory general warrants could be issued in any city where a Communist had been identified or in any political movement or in any other form of association. Thus the decision below, while employing slightly different terminology, has the obvious effect of validating the Government's man-off-the-street theory.

violation of Fourth and Fifth Amendment procedural guarantees, there is added in this case the Subcommittee's invasion of First Amendment substantive protections, which underlines the double necessity for adherence to procedural requirements. This coalescence of procedural and substantive constitutional violations will come as no surprise to this Court. Summarizing the pertinent constitutional history, the Court recently recalled in *Marcus* v. *Search Warrants*, 367 U.S. 717, 729, that "*The bill of rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.*" Unlike ordinary offenses consisting of consummated acts, "political offenses" generally involve beliefs, assocations, tendencies and expressions. The pre-Revolutionary British history illustrates the indispensable interplay between dragnet inquiry into such intangible offenses as seditious or heretical association, belief or expression, and the dragnet or general search power by which such political heresy is effectively rooted out. The arbitrary interrogation of this petitioner in the course of the Subcommittee's New York Times investigation of 1956, is a current illustration of the functional relationship between invasions of personal privacy and intrusion upon freedoms of speech, press and assembly. Nor is there any question that the Subcommittee's intrusion had both the purpose and effect of restraining the free exercise of rights of speech and press.

C. The Subcommittee's Intrusion on First Amendment Liberties.

While the hearing record is replete with protestations that the Subcommittee was not investigating the press or the Times, but merely Communist influence therein, the full record demonstrates the contrary. In its interroga-

tion of Times witnesses, the Subcommittee certainly did not restrict itself to questions about Communist Party membership and activity, but ranged widely into personal and private affairs.[49] Indeed, there is evidence (see R. 145-168) that the New York Times was consciously selected by Sourwine and Chairman Eastland as a Subcommittee target. For example, 30 of the 38 witnesses called at the 1955 executive hearing were or had been connected with the Times and 15 out of 18 witnesses called at the 1956 public hearing were so connected (R. 145-149). In addition, Times witnesses were repeatedly asked about their employment status and conversations with the Times since the time the Subcommittee had first called the witness, questions which could have no other purpose or effect than to embarrass the Times as to those already discharged and coerce it as to those yet retained. See Hearings, *Strategy and Tactics of World Communism*, before the Senate Internal Security Subcommittee, 84th Cong. 2nd Sess., Part 17, pp. 1642, 1727, 1731-32, 1754-55, 1757-60, 1774, 1782-83, 1785-86.[50]

While it is commendable that the New York Times has retained this petitioner in its employ, the impact of the Subcommittee's investigation of the press cannot be measured by the courage of its most powerful representative. The content of the press is shaped by persons who write

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[49] See e.g. R. 85-86 and interrogations of Alden Whitman (No. 10) and James S. Glaser (Hearings, Part 17, pp. 1589 et seq.).

[50] Nor can the infringement on First Amendment rights be taken out of the context of the entire questioning to which petitioner was subjected. When petitioner read a respectful statement explaining why he thought he was within his rights in refusing to answer some of the questions addressed to him, the Subcommittee subjected him to needless humiliation and embarrassment. It asked him if he knew his counsel, a distinguished non-Communist civil libertarian, to be a Communist (R. 59-60). It demanded to know who had helped him in writing the statement he made to the Subcommittee (R. 63-64, 92) and it further demanded to know the content of private conversations he had with his employers at the New York Times (R. 94-95).

the news. The inevitable effect of wholesale interrogation and exposure of any alleged Communists or others the Subcommittee could find on the New York Times, is necessarily to discourage newspapers from hiring persons of unpopular, unorthodox, or minority views, past or present, who may become the subjects of similar Congressional scrutiny. The resulting elimination of persons from the press who hold or held minority views, is as effective a form of censorship and restraint as the deletion of the material they could contribute to the press.

In *Watkins* v. *United States*, 354 U.S. 178, 197, this Court provided pertinent reminder of the First Amendment's applicability to Congressional investigation: "Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of law-making. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by law-making." And, to emphasize its concern, the Court referred to the necessary "accommodation of the Congressional need for particular information with the individual and personal interest in privacy", and concluded (at 198) that "*the critical element is the existence of, and weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness.*" Whatever might be said of the impact of the First Amendment when the Subcommittee questioned other witnesses in its New York Times hearing (as to whom it might have had reason to believe them possessed of pertinent information),[51] clearly the First

[51] While we recognize that since *Watkins* this Court has given considerable scope to the Congressional need for information in its balancing of that need against First Amendment protections (see *Barenblatt* and

Amendment imposes an insuperable bar to affirmance of this petitioner's conviction. *Lacking any probable cause or reason to believe Shelton to have pertinent information on the Subcommittee's inquiry, there is no "Congressional need" presented here for "accommodation . . . with the individual and personal interest in privacy."* There can be no Congressional need for the testimony of a victim of accident. And if, as this Court explained in *Watkins*, "the critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosure from an unwilling witness", here the Court cannot properly give any weight to a Congressional "interest" in demanding disclosure by any or every member of the working press to check on "possible Communist Party activities among his fellow employees".

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The undeniably repressive effect upon First Amendment freedoms of an investigation such as the Subcommittee's 1956 New York Times inquiry, underlines the importance of holding Congressional hearings to accepted constitutional and statutory standards of procedural fair-

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Wilkinson, supra), each investigation must of course be separately viewed under the *Watkins* test. Thus viewed, the Internal Security Subcommittee's January 1956 New York Times hearing infringed more directly upon First Amendment protections and was less justified by a showing of Congressional need than any similar inquiry previously before this Court. No one has ever suggested, even Mr. Scarwine (R. 149), that the Communists ever had any measure of success in subverting the Times to the cause of Communism. Thus, all apart from the unique circumstances under which the First Amendment question arises with respect to petitioner Shelton, we respectfully suggest that if this Court's *Watkins* requirement of a judicial balancing of Congressional need against the First Amendment has any vitality, the New York Times hearing of 1956 intruded too far and with too little justification to withstand the force of the First Amendment.

ness.[52] Whether the Subcommittee's interrogation of petitioner be deemed violative of Fourth, Fifth or First Amendment rights taken separately or together (or of the contempt statute's requirement of pertinency),[53] it is clear that federal courts cannot, through contempt convictions, vindicate Congressional process under which newspapermen are arbitrarily called and questioned about Communism without reason to believe that they have pertinent information on that subject.

But were these compelling considerations not wholly dispositive of the case at bar, there remain additional defects in the proceedings below, particularly in the violation of the ruling in *Watkins* concerning a necessary and defined "question under inquiry." We turn now to consideration of these additional questions.

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[52] This Court has often affirmed the special importance of full adherence to procedural requirements in areas of potential infringement upon First Amendment liberties. Thus, the Fifth and Sixth Amendment requirement of definiteness in criminal enactments has been given additional significance by this Court in cases involving the exercise of First Amendment rights. See *Smith* v. *California*, 361 U.S. 147; *Winters* v. *New York*, 333 U.S. 507, 509-10; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Thornhill* v. *Alabama*, 310 U.S. 88; *Herndon* v. *Lowry*, 301 U.S. 242; *Stromberg* v. *California*, 283 U.S. 359. Whatever might be said of Congressional inquiry without probable cause in other areas, where as here the investigation directly concerns speech, press and association, dragnet process is doubly barred by the Bill of Rights.

[53] While we have emphasized in the text the constitutional objections to compulsory "fishing expeditions" by Congressional committees, we suggest that the same circumstances which give rise to the constitutional violation herein likewise require the conclusion that the Subcommittee's interrogation of petitioner, without reason to believe him possessed of relevant information on its inquiry, preclude a finding that within the meaning of 2 U.S.C. 192 the questions involved were "pertinent to the question under inquiry" before the Subcommittee. Thus, in *United States* v. *Orman*, 207 F. 2d 148, 154-55, the Third Circuit made clear that Congressional investigations "in the mere hope of stumbling upon valuable information" would not support contempt citations, for "the United States in a contempt proceeding must prove . . . the relation of the questions, the documents and the particular witness to the investigation."

II

Contrary to Constitutional Due Process and Statutory Requirements There Was No Delimited "Question Under Inquiry" Before the Subcommittee at the Time of Petitioner's Appearance.

1. No delimited inquiry such as required by this Court's *Watkins* ruling, was made apparent to petitioner when he was questioned by the Subcommittee. The difficulties in this case concerning the nature of the "question under inquiry" in petitioner's interrogation began with the inquiry, were exacerbated at the trial, and remain unanswered even after judgment in the Court of Appeals.[54] As we have demonstrated (see *supra*, pp. 17 to 21), successively different definitions of the question under inquiry were given by Senator Eastland and by Senator Hennings at the hearing; by the Assistant United States Attorney in response to a requested bill of particulars; by Government witness Sourwine at the trial; and by the lower court opinions. Certainly, where the views of the Subcommittee members and of the prosecution, the trial evidence, and the findings of the lower courts on the "question under inquiry"

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[54] The opinion below suggests that petitioner failed to inquire of the Subcommittee concerning the "question under inquiry" and that the Subcommittee therefore had no obligation to make the point luminous to him. But prior to being sworn at the 1956 hearing, petitioner challenged the jurisdiction of the Subcommittee on the grounds that the Subcommittee knew it could *"obtain no information from me that could possibly assist it in any legislative purpose"* and said, *"I fail to see why I am involved in this hearing, which the chairman said on Wednesday stems from the Burdett testimony. There was no reference to me in the Burdett testimony . . ."* (R. 84). If such an initial challenge, followed by specific objection to the jurisdiction of the Subcommittee at the time of refusals to answer, did not place upon the Subcommittee the duty of enlightening petitioner as to the "question under inquiry", then a Congressional witness has truly become a pawn in a battle of legal niceties.

are as diverse and inconsistent as in the instant case, it cannot be said that the point was made sufficiently luminous to the witness at the time of the Subcommittee interrogation to meet constitutional due process requirements. As this Court ruled in *Watkins* (354 U.S. at 208-9):

> "The problem attains proportion when viewed from the standpoint of the witness who appears before a congressional committee . . . It is obvious that a person compelled to make this choice is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. That knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense."[55]

In sum, the hopeless and continuing confusion reflected on all sides demonstrates the utter lack of any delimited subject of investigation to which petitioner might have related the pertinence of the questions at the time they were addressed to him. That, indeed, is the ruling regarding this very New York Times inquiry of the Subcommittee, rendered by Judge Youngdahl in *United States* v. *Peck*, 154 F. Supp. 603, 611:

> "That the question under inquiry was not 'luminous' to the witness is the result of the precise defects in the method of exercising legislative authority which

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[55] See also *Scull* v. *Virginia*, 359 U.S. 344. Mr. Justice Harlan and Mr. Justice Frankfurter recently gave voice in their dissenting opinion in *Deutch* v. *United States*, 367 U.S. 456, 473, to a principle which we believe commands the approval of the entire Court and which is equally controlling here, where the trial evidence demonstrates different "questions under inquiry" from those enumerated at the Subcommittee's hearing:

> "it would be obviously unfair to allow the Government at trial to prove pertinency on a different theory than was given to the defendant at the time he testified, and on the basis of which he presumably determined that he need not answer the question put."

were involved in Watkins. In this case, too, 'there is a wide gulf between the responsibility for the use of investigative power and the actual exercise of that power.' In this case, too, the Subcommittee ranged over many subjects during the course of its investigations, did not clearly establish any lines of demarcation between series of investigations, and did not restrict its questioning of the witnesses to any one field. The witness could not be aware of the subject under inquiry because there was no subject, except for the broad, vague, general authority of the Subcommittee."

Shelton and Peck were not the only witnesses at the New York Times hearing as to whom the question under inquiry was not made luminous. This Court will find from the records in *Whitman* (No. 10) and *Price* (No. 12) similar confusion concerning the question under inquiry by this Subcommittee. For the convenience of the Court, we have attached an Appendix (p. 67, *infra*) summarizing the utter confusion reflected at each stage of these four proceedings concerning the question or questions under inquiry. Whether it was because the Subcommittee did not yet have the guidance of the *Watkins* decision, or whether it was because the Subcommittee's primary interest was in the coercion of the New York Times, we respectfully submit that no one, from witnesses to Subcommittee counsel, from prosecutor to Subcommittee members, had the vaguest idea of any actual delimited question under inquiry in the January, 1956 hearing of the Subcommittee. Petition's interrogation having had no discernable and delimited subject, due process prevents his conviction for contempt.

2. Whether a sufficiently delimited inquiry was made manifest when petitioner was questioned need not be decided, for here the Government's bill of particulars on the

"question under inquiry" to be proved under 2 U.S.C. § 192 calls directly into play this Court's *Watkins* holding that a general authorizing resolution is not itself sufficiently precise to serve as a "question under inquiry." In the District Court the prosecution, by its bill of particulars, elected to rely on precisely such a broad authorizing resolution (Senate Resolution 366) *and no lesser inquiry* as the "question under inquiry" to be proved under the indictment.[56] While both courts below sought to find a more limited inquiry—Communist influence on the Times or in communications—the bill of particulars is, of course, binding for the proposition that no such limited question under inquiry was being pursued by the Subcommittee in its interrogation of petitioner. See, e.g. *United States* v. *Neff*, 212 F.2d 297, 309. The only remaining question is whether Section 3 of Senate Resolution 366 (see p. 3, *supra*) has the specificity which this Court ruled in *Watkins* was lacking in the House Un-American Activities Committee au-

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[56] The Assistant United States Attorney gave his bill of particulars in open court regarding the "question under inquiry", stating (R. 20):

> "the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted.
>
> "This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose . . ."

Earlier, the United States Attorney had stated his theory that "For the defendant to know what particular inquiry may have been uppermost in the minds of the committee, without restricting its general authority, would be of no help because the pertinency of the question asked would be as broad as the authority which the committee had, and that is stated in the resolution itself . . . " (R. 17).

Surprisingly, in opposing the grant of certiorari the Government suggested that the bill of particulars on the question under inquiry point was only "an oral statement" made in reference to another matter. In a supplemental memorandum for the United States later filed, after petitioner had pointed out this gross inaccuracy, the Government confessed that it "was incorrect" and in "error" in having suggested that there was no bill of particulars on the question under inquiry point (pp. 2-3). We deem it settled for the remainder of this case that the bill of particulars in fact disavowed any narrower question under inquiry than the Subcommittee's authorizing resolution.

thorizing resolution. Even cursory comparison of the two texts is sufficient to demonstrate that the almost identical substance of the Senate Resolution is no more precise as a "question under inquiry" than is that of the House.

Thus the exact holding of *Watkins* that a general authorizing resolution does not constitute a sufficiently delimited "question under inquiry" is controlling in the instant case. And so, it should be noted, is this Court's more recent ruling in *Deutch* v. *United States*, 367 U.S. 456. For if there was no delimited question under inquiry before the Subcommittee at the time of the witness's appearance, then the Government has necessarily failed to meet its burden under 2 U.S.C. § 192 of showing that the unanswered questions were "pertinent to the question under inquiry." Without a subject under inquiry, the Government cannot establish the pertinency of the Subcommittee's questions.[87]

A construction which permits a Congressional committee to compel testimony without a defined subject of investigation would place every witness in the position which one member of the Subcommittee frankly stated to be the position of this petitioner. We believe the point here urged upon the Court was nowhere better stated than by then Subcommittee Chairman Hennings, in a colloquy at petitioner's first interrogation (R. 60, emphasis supplied):

> "Mr. Fraenkel. The witness has stated he does not consider the question pertinent, nor do I. I would

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[87] All apart from considerations of fair notice to the witness at the time of the hearing, petitioner's conviction cannot stand where, as here, the Judge found the "question under inquiry", an element of the offense charged, to be *other* than the "question under inquiry" to which the Government bound itself by its answer to the bill of particulars. See R. 199-200, *United States* v. *Neff*, 212 F. 2d 297, 309-310. The Judge could not properly find as proven a material fact which the Government was estopped from proving under its bill of particulars. Cf. *Giordenello* v. *United States*, 357 U.S. 480.

advise him, as his lawyer, that he is not obliged to answer such a question.

"Senator Hennings. Then you are advising him not to answer on the ground that the question is lacking in relevancy or pertinence?

"Mr. Fraenkel. This is right.

"Senator Hennings. *The Chair might observe, sir, that it would seem to me rather difficult for you to determine as counsel or for this witness to determine what is relevant or what is pertinent to the subject matter of the entire inquiry.*"

It was exactly this inability of the witness to determine pertinency to the question under inquiry which *Watkins* was intended to prevent.

We are confident that this Court will recognize, as readily as did Subcommittee Chairman Hennings, petitioner's difficulty in determining how the questions addressed to him might be pertinent to the scope of the Subcommittee's diffuse and discursive inquiry. *We respectfully submit that, whether the vagueness of the proceedings be viewed as of the time of petitioner's interrogation or as of the time of his trial under the bill of particulars, there was no "question under inquiry" sufficient either to meet his due process rights at the hearing or to justify his conviction at the trial.*

III

Petitioner's Conviction Must Be Reversed Because the Indictment Failed to State the "Question Under Inquiry"

The indictment against Robert Shelton stated only generally that as a witness before a Congressional subcommittee he was asked questions "which were pertinent to the question then under inquiry" and "refused to answer those pertinent questions" (R. 1). Petitioner's mo-

tion to dismiss because the indictment fails to set forth the question under inquiry was denied (R. 19) and the Court of Appeals affirmed on this point (R. 242). For the sake of brevity and the convenience of the Court, petitioner Shelton relies on Argument II of the brief for petitioner in *Russell* v. *United States* (No. 8) and requests reversal on the authorities there presented.

IV

Petitioner Was Deprived of His Right to a Fair and Impartial Grand Jury

The grand jury records show that fourteen of the twenty-three members of the grand jury which voted the indictment against petitioner were, at that time, employed by the United States Government (R. 4). The intimidatory impact of nine years of operation of loyalty-security programs and the frightening effect of the McCarthy hearings on government employees as a class (R. 6) was more than sufficient to bar the fourteen government employees (a majority of the grand jury) from participation in its deliberations and requires the dismissal of the indictment. Petitioner Shelton, for the sake of brevity and the convenience of the Court, relies on Argument I of the brief for petitioner in *Russell* v. *United States* (No. 8). In both cases a majority of the grand jury (thirteen in *Russell*, fourteen here) was composed of government employees and the grand jury sessions were held in Washington, D.C., under the influence of the loyalty-security programs. Under such conditions there seems little doubt that these government employees acting as grand jurors could not give a fair and unbiased judgment to an individual accused on charges involving alleged Communism and the indictment must therefore be dismissed.

Conclusion

Nowhere are the procedural guarantees of the Bill of Rights more applicable and more important than in areas of potential intrusion upon First Amendment liberties. As this Court stated in its recent decision in *Scull* v. *Virginia*, 359 U.S. 344, 353, in reversing a legislative contempt conviction for vagueness, "certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press and association . . ." In this case, from the moment that petitioner was served with a subpoena for "Willard Shelton or Robert Shelton", vagueness has attended every aspect of the proceedings.

It was unclear at petitioner's first interrogation why he was subpoenaed at all, and what question was then under inquiry—whether, as Committee Counsel stated it, "a question of identity" alone was involved or what. It is equally unclear why petitioner was interrogated a second time and on what subject of inquiry.

And at petitioner's trial, additional uncertainties were injected. The Government affirmed in a bill of particulars that the entire vague Subcommittee resolution was the "question under inquiry" and then proceeded to introduce evidence as to the question under inquiry directly contrary to that bill of particulars. The Government sought to justify the contempt conviction on the expansive theory that the Internal Security Subcommittee can call and question "a man off the street" about Communist activity—even though the Government's principal witness testified that the Subcommittee had not acted on any such theory. Additional uncertainty was injected by the courts below, which sought to excuse petitioner's interrogation on an elastic rationale of probable cause (general inquisition for Communism among newspaper employees) never pursued by the Subcommittee itself. Finally, the courts below es-

poused a "question under inquiry" at petitioner's interrogation which is contrary to *both* the bill of particulars and to the Government's evidence at trial.

Whatever constitutional or statutory basis be selected as the one most clearly offended by this series of flabby inconsistencies, fundamental fairness and certainty of legal process were here clearly transgressed in a sensitive First Amendment area. Criminality cannot be affirmed where essential elements thereof are so fraught with uncertainty and contradiction. Accordingly we urge that the decision below should be reversed and a judgment of acquittal entered in petitioner's case.

Respectfully submitted,

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APPENDIX A

SUMMARY OF ALLEGED QUESTIONS UNDER INQUIRY

	SHELTON	WHITMAN	PRICE	PECK
STATEMENTS OF COMMITTEE MEMBERS BEFORE HEARINGS (Not in Presence of Present Petitioners)	"Subsequent chapter to the Burdett testimony [1]—"not an attack upon the free press" [2]—attempt of Communist party to influence or subvert American press [3]—"We are not singling out any newspaper and not investigating any newspaper or any group of newspapers. We are simply investigating communism wherever we find it" [4].			
STATEMENTS BY COMMITTEE COUNSEL SOURWINE TO OTHER WITNESSES	*Not* investigation into "Communist infiltration of the press and other forms of communication" [5]—"the subject matter of the Committee's inquiry is Communist activity" [6].			
STATEMENTS BY COMMITTEE TO WITNESSES (Open Hearings)	"Your employment" [7]—"Whether you are a member of the conspiracy to destroy the government of the United States" [8]—credibility of witness [9].	"Your standing and influence in the organization" [New York Times] [10]—membership of Communist cell in New York City in 1930's [11]—"who your associates were in the Communist Party" [12].	To qualify witness to answer questions regarding slate of candidates in Newspaper Guild election [13]—testing the credibility of the witness. [14]	No explanation to witness. [15]
INDICTMENTS	Question under inquiry not stated.	Question under inquiry not stated.	Question under inquiry not stated.	Question under inquiry not stated.
STATEMENTS OF PROSECUTOR	"the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted. This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose." [16]	Communist activities in New York area in the field of strategy and tactics of world communism—"internal security and national security of the United States" [17].	"rout out communists and locate them wherever they are" [18]—"find where communists were, wherever they may be found" [19]. Powers of subcommittee "at least as broad as any that the full committee had already and perhaps a little more broad" [20].	"'The full committee powers' or the entire scope of the authorizing resolution" [21].
TESTIMONY OF COMMITTEE COUNSEL	"extent and activities of the communist conspiract against the United States, more specifically, as it applied to New York area, and on the particular day he testified, and with regard to his testimony, still more specifically within that broader area, and we endeavored to get information about communist activity in the New York Times or in connection with employees of the New York Times or by such employees." [22] "Communist activity and infiltration of mass communications in New York City". [23]	Communist espionage—operations of the Communist Party—strategy and tactics of world communism particularly in area of mass communications [24]—conspiracy to overthrow the government of the United States by force and violence [25].	Strategy and tactics of Communist Party [26]—important whether witness had signed in 1941 a statement in defense of the Communist Party [27]—Not lawful political activities of members of Communist Party [28].	"We were after each Communist cell that we could find in any industry in the United States, and we were after them to get a picture of it as a basis for legislation" [29].
DETERMINATIONS BY TRIAL COURTS	"extent and nature of communist infiltration into news dispensing agencies" [30].	"the growth or the decline of the Communist Party and its numerical strength at various times as part of an inquiry into the extent of the activities of the Communist Party and the legislative means that might be appropriate for dealing with such activities" [31].	Court refers only to "the internal security; in fact the national security, of this country" [32].	"Communist infiltration into mass communications". [33]
GOVERNMENT BRIEFS IN COURT OF APPEALS	Government relies entirely on Senate resolution and statements made before the hear-	Communism [34].	Government relies entirely on Senate resolution and statements made before the hear-	Acquitted.

	tion about communist activity in the New York Times or in connection with employees of the New York Times or by such employees."[22] "Communist activity and infiltration of mass communications in New York City".[23]			
DETERMINATIONS BY TRIAL COURTS	"extent and nature of communist infiltration into news dispensing agencies"[29].	"the growth or the decline of the Communist Party and its numerical strength at various times as part of an inquiry into the extent of the activities of the Communist Party and the legislative means that might be appropriate for dealing with such activities"[31].	Court refers only to "the internal security; in fact the national security, of this country"[32].	"Communist infiltration into mass communications".[33]
GOVERNMENT BRIEFS IN COURT OF APPEALS	Government relies entirely on Senate resolution and statements made before the hearings[34].	Communism[35].	Government relies entirely on Senate resolution and statements made before the hearings[36].	Acquitted.
DECISIONS OF COURT OF APPEALS	"infiltration of Communists into the radio, TV, and the press."[37]	Mechanics of party membership[38].	Not stated[39].	Acquitted.

[1] Hearings, page 1587.
[2], [3], [4] Ibid.
[5] Hearings, page 1616 (colloquy during testimony of James S. Glaser).
[6] Hearings, page 1652 (colloquy during testimony of Jerry Zalph).
[7] Hearings, page 1721 (R. No. 9, page 85).
[8] Hearings, page 1725 (R. No. 9, page 91).
[9] Hearings, page 1727 (R. No. 9, page 93).
[10] Hearings, page 1730.
[11] Hearings, page 1737. Chairman stated this to be "The very heart of this inquiry."
[12] Hearings, page 1738.
[13] Hearings, page 1681.
[14] Hearings, pages 1695–6.
[15] Hearings, pages 1774–1784.
[16] Prosecutor's oral Bill of Particulars (R. No. 9, page 20). See also R. 17–18, 40.
[17] Transcript *United States* v. *Whitman* (Criminal 1213–56 DC DC) p. 6.
[18] Joint Appendix (J.A.) No. 12, p. 133.
[19] Id., p. 134.
[20] Id., p. 49.
[21] Quote in *United States* v. *Peck*, 154 F. Supp. 603, 610, note 25.
[22] R. No. 9, page 139.
[23] R. No. 9, pages 156–7.
[24] J. A. No. 10, p. 31.
[25] Id., p. 32–33.
[26] J. A. No. 12, p. 54.
[27] Id., p. 103. (See also pp. 117–18, 127 and 128.)
[28] Id., p. 80.
[29] Transcript in *United States* v. *Peck*, Criminal 1214–56, page 235 (testimony of Senator Eastland, Chairman of Committee).
[30] R. No. 9, pages 224–5.
[31] J. A. No. 10, p. 54–55.
[32] Tr. 331-2 of trial record in *United States* v. *Price* (DCDC).
[33] *United States* v. *Peck*, 154 F. Supp. 603, 610, note 25.
[34] Brief for Appellee, *Shelton* v. *United States* (CADC 13737, pages 2–4).
[35] Brief for Appellee, *Whitman* v. *United States*, (CADC 15416, pages 10–11, 13, 14).
[36] Brief for Appellee, *Price* v. *United States*, (CADC 13925, pp. 2, 4 and 20).
[37] R. No. 9, page 243.
[38] *Whitman* v. *United States*, 281 F. 2d 59, 61. This determination was made with regard to question no. 8 in the indictment. The Prosecutor had told the District Court that the purpose of this question was to test the credibility of the witness. The Court of Appeals did not state what it believed was the purpose of the inquiry generally.
[39] Compare *Deutch* v. *United States*, 367 U.S. 456, 467.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 246

ROBERT SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted to clarify a footnote in the Government's Brief in Opposition (p. 15, fn. 7) which has been discussed in Petitioner's Reply Memorandum (pp. 4–8). We will therefore not address ourselves to petitioner's contentions, in his Reply Memorandum (pp. 2–4), concerning the issue of probable cause raised in this case. This matter has been fully covered in the Brief in Opposition (pp. 8–11).

In its Brief in Opposition, the government (pp. 13–15) answered petitioner's contention that the subcommittee had not apprised petitioner of the subject under inquiry. The government contended (1) that petitioner had failed to make a clear objection to the pertinency of the questions which he refused to an-

swer as required by *Barenblatt* v. *United States*, 360 U.S. 109, 124, and (2) that the record of the subcommittee hearings fully supported the finding of the district court, which was affirmed by the court of appeals, that petitioner was aware at the time he appeared before the subcommittee that the subject under inquiry was Communist infiltration of the press.

In a footnote (p. 15, fn. 7) the government replied to petitioner's claim (Pet. 26–27) that an Assistant United States Attorney had stated in the district court in a bill of particulars that the subject under inquiry was that stated in the authorizing resolution as to Communist activities generally, not the lesser inquiry of Communist infiltration in the newspaper field. This footnote indicated that the "bill of particulars" referred to by petitioner was actually merely an oral statement by the Assistant United States Attorney and that this statement concerned the extent of the subcommittee's authority to investigate, not the actual subject under inquiry. Petitioner, in his Reply Memorandum, challenges these parts of the footnote as "misleading" (p. 5).

We agree with petitioner that the footnote was incorrect and may have been inadvertently misleading. As petitioner points out in his Reply Memorandum and as the record shows (see the Appendix, *infra*, pp. 7–11),[1] the statement of the Assistant United States Attorney was made in lieu of a formal, written bill of

[1] The entire colloquy, as included in the Joint Appendix (pp. 2–6), is set forth in the Appendix, *infra*, pp. 7–11.

particulars. The Assistant United States Attorney specifically said that the subject under inquiry before the subcommittee was the full scope of the authorizing resolution and not a "smaller, more limited inquiry" (see the Appendix, *infra*, p. 10). His statement was devoted to the issue of pertinency and not merely to the subcommittee's authority (as we said in our Brief in Opposition).

Despite, however, the error in the Government's Brief in Opposition, we continue to emphasize that petitioner's basic contention is without substance for the reasons primarily relied upon in that brief. Petitioner did not properly raise this objection because, as the record shows, he was aware of the subject being investigated. In fact, besides the evidence cited in our original brief (pp. 14–15), petitioner's statement (which he read to the subcommittee) concerning his reasons for refusing to answer also demonstrates his awareness that the subject under inquiry was Communist infiltration of the press (see the opinion of the district court, Pet. 42). This statement is devoted almost in entirety to petitioner's objection that the subcommittee's investigation was an interference with freedom of the press.[2]

The statement of the Assistant United States Attorney at the trial did not preclude the government from introducing evidence that the subject under inquiry was Communist infiltration of the press. The

[2] Hearings Before the Subcommittee To Investigate the Administration of the Internal Security Act and Other Internal Security Laws of the Committee on the Judiciary, U.S. Senate, 84th Cong., 2d Sess., Part 17, pp. 1723–1725.

latter subject is merely one portion of the broader subject of Communist activities in general which the resolution authorizes the subcommittee to investigate. Thus, when the subcommittee is investigating the narrower problem of Communist infiltration of the press, it is simultaneously investigating the broader subject which it is authorized to investigate. The introduction of evidence on the narrower problem was therefore consistent with the statement of the Assistant United States Attorney that the subject under investigation was the full scope of the subcommittee's authority.

While the Assistant United States Attorney did state that there was no "smaller, more limited inquiry being conducted" (*infra*, p. 10), he apparently meant that the subcommittee was not *restricted* to showing any inquiry less than the full authorizing resolution. In fact, he specifically said that his remarks as to the exact subject under inquiry should not be taken to limit the scope of the government's proof at the subsequent trial (*infra*, p. 8):

> That [the subject under inquiry] is a matter of fact that will come out at the trial and the proof. [Petitioner] is not entitled to have it in advance because the authority that this subcommittee was acting under is found in the resolution which I have already referred to, and there is no particularly defined inquiry less than the full authority to which this committee was restricted at this particular hearing.

Thus, the oral statement was not binding on the government so as to restrict the exact subject under inquiry which the government intended to prove.

In any event, even if it can be said that there was a variance between the prosecutor's oral statement as to the subject of the inquiry and the proof introduced at petitioner's trial, the variance would not be a material one. The crucial question when there is such a variance is whether the defendant has been prejudiced. See *United States* v. *Costello,* 221 F. 2d 668, 675 (C.A. 2), affirmed, 350 U.S. 359; *Neal* v. *United States,* 185 F. 2d 441 (C.A. D.C.), certiorari denied, 340 U.S. 937; *Shayne* v. *United States,* 255 F. 2d 739, 743–744 (C.A. 9), certiorari denied, 358 U.S. 823; *McKenna* v. *United States,* 232 F. 2d 431, 436–437 (C.A. 8). Here, petitioner does not claim and has never shown surprise or any other basis for prejudice.[3]

CONCLUSION

It is respectfully submitted that, for the foregoing reasons and those stated in the Government's Brief in Opposition, the petition for certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

SEPTEMBER 1960.

[3] The variance here, if any, was not nearly so great as that in *Stirone* v. *United States,* 361 U.S. 212. Moreover, a variance between the indictment and the proof introduced is considerably more serious than a variance between the bill of particulars or binding oral statement and such proof. The grand jury might not have been willing to return an indictment with a charge conforming to the proof actually introduced. Thus, potential prejudice is more likely to be inherent in a variance with an indictment. On the other hand, since the trial court could have allowed amendment of the bill of particulars even during the trial, substantial prejudice must be shown as to any variance with a bill of particulars.

APPENDIX

The following statements appear at pp. 2–6 of the Joint Appendix:

Mr. SILARD.

* * * * *

I would like to ask Your Honor if he feels that the indictment is nevertheless sufficient, to consider the possibility of a bill of particulars so that we may know before trial what authority this committee presumed to exercise, what the scope and nature of the grant of that authority was and what the nature of the inquiry was, because as of now we stand helpless to know what these questions were pertinent to, what the inquiry was, who authorized the inquiry, and what the scope of the authority of the committee was.

* * * * *

Mr. HITZ. Your Honor, the indictment sets out the authority for this committee to act; most particularly, Senate Resolution 366 is the resolution of Congress which expands very slightly the authority which was given to this committee, that is, the Committee on the Judiciary by the Reorganization Act of 1946. This special resolution is one which gives this committee or any duly authorized subcommittee the authority to make investigations for legislative purposes in the field of subversive activities. That can, of course, be obtained by anyone who is interested in it from the Senate of the United States.

We cite it and it can be obtained. That will, of course, outline the authority of this particular committee.

We state in the indictment that the Internal Security Subcommittee, briefly put, was the body of the Judiciary Committee which was conducting the particular hearings under the resolution which gave these powers to the full committee and, when we state in the fourth line that this subcommittee of the full committee was conducting hearings pursuant to the authority which created this power in the committee, we are, of course, stating that they were conducting hearings which properly were before that committee. That is the conclusion, of course, from what we have stated here.

When we state that the questions which were refused of answer were pertinent to the inquiry which was being conducted, we are, of course, stating these were proper questions and that it was before an inquiry which was authorized by the resolution.

The COURT. Defense counsel's point there is that you do not state what the inquiry was about.

Mr. HITZ. That is right.

The COURT. What do you say about that?

Mr. HITZ. That is a matter of fact that will come out at the trial and the proof. He is not entitled to have it in advance because the authority that this subcommittee was acting under is found in the resolution which I have already referred to, and there is no particularly defined inquiry less than the full authority to which this committee was restricted at this particular hearing.

The COURT. I notice that Count 1 attempts to indicate that the subject of communism was being inquired into. Does the resolution creating the committee and the subcommittee authorize the subcommittee to investigate communism?

Mr. HITZ. Not in so many words. In general, it does.

The COURT. The subject was within the general jurisdiction?

Mr. HITZ. Yes. It comes in part 3 of the resolution which states, "the extent, nature and effects of subversive activities in the United States" and so forth. That, of course, embraces communism.

Let us assume that the particular inquiry at the moment might have been subversive activities in the field of education. That does not limit and does not restrict the full authority that was granted to this committee by the resolution and, therefore, the committee, through this subcommittee, could make all inquiries that were authorized by it to make. For the defendant to know what particular inquiry may have been uppermost in the minds of the committee, without restricting its general authority, would be of no help because the pertinency of the question asked would be as broad as the authority which the committee had, and that is stated in the resolution itself which may be obtained, so that we say not only is the indictment sufficient as it stands to charge the offense, but it is sufficient, without further particularization, to inform the defendant of the charge that he must meet and to protect him from a second prosecution.

* * * * *

The COURT. I am not going to pass on an informal request for a bill of particulars unless the Government consents that the matter be handled that way, because the Government is entitled to notice of such an application and is entitled to give it consideration.

Mr. HITZ. I will waive written notice of the bill of particulars, if Your Honor would care to hear it orally from counsel.

The COURT. I shall be glad to hear it.

Very well, I will hear your application.

Mr. SILARD. The request of the bill is for the same information as the first point of our motion to dismiss, that is, for the specific authority under which the subcommittee was said to

be conducting hearings and, secondly, for the nature of the question under inquiry before said committee.

The COURT. What do you say about that, Mr. Hitz?

Mr. HITZ. The resolution, No. 366, provides in two places for the duties of the full committee which were authorized by this particular resolution to be carried on by any duly authorized subcommittee thereof.

In that sense, I am supplying at this moment the authority for the subcommittee named in the indictment to carry on the purposes of the full committee contained in the resolution.

We will prove, at a later time, the transfer of the authority contained in this particular resolution from the full committee to the subcommittee.

As to the second asking, the Government contends, and the indictment states, that the inquiry being conducted was pursuant to this resolution. We do not feel, and it is not the case, that there was any smaller, more limited inquiry being conducted.

This committee was conducting the inquiry for the purposes contained in the resolution and no lesser purpose so that, in that sense, the asking No. 2 of counsel will be supplied by his reading the resolution.

The COURT. It seems to the Court that the Government has supplied the bill of particulars orally.

Mr. SILARD. Except in this one sense: that I asked, in by motion to dismiss—perhaps I didn't do it well—the nature and scope of the grant to this committee. That has not been given to us.

The COURT. I think it has been sufficiently given.

I will deny the motion for a bill of particulars in view of the fact that the oral statement just made by counsel for the Government will be sufficient compliance if the motion were granted. You have the particulars.

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